Washington and Lee Law Review

Volume 66 | Issue 1 Article 6

Winter 1-1-2009

Reconceptualizing Competence: An Appeal

Mae C. Quinn

Reconceptualizing Competence: An Appeal

Mae C. Quinn*

Table of Contents

---

* Associate Professor of Law, University of Tennessee College of Law. I am deeply indebted to Stacey Eckard, Anna Gracey, James Inman, Karen Kenney, Monica Wooland, and Tara Wyllie for their extraordinary research and other fine work on this article. For helping me think through the early stages of this project, I am grateful to Paul Marcus, Jim Moliterno, Michael Perlin, Emily Sack, Abbe Smith, Bruce Winick, and David Wexler. Ben Barton, Jerry Black, Iris Goodwin, Keith Findlay, Dan Kaplan, Skip Laisure, William Montross, Maurice Stucke, and Penny White deserve special thanks for sharing their expertise and insights, which significantly improved this piece. Thanks also to the organizers of the 30th Annual Congress of Law and Mental Health, Padua, Italy, where an earlier version of this paper was presented. Finally, Jennifer Hendricks, Laura Rosenbury, and Leticia Saucido are largely responsible for the completion of this article by their support and participation in the first annual Law Women Summer Writing Retreat held in Albuquerque, New Mexico.

I. Introduction

Our jails and prisons—referred to as the "new asylums" in this country[1]—are filled with the mentally ill.[2] Yet they provide woefully inadequate mental health services for the incarcerated impaired, operating merely as "warehouse[s]" for those rejected by society.[3] Thus many inmates silently

---

1. *Frontline: The New Asylums* (PBS television broadcast May 10, 2005).

2. *See* HUMAN RIGHTS WATCH, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* 1, 1 (2003), *available at* http://www.hrw.org/reports/2003/10/21/ill-equipped ("[B]etween two and three hundred thousand men and women in U.S. prisons suffer from mental disorders, including such serious illnesses as schizophrenia, bipolar disorder, and major depression."); HENRY J. STEADMAN & PAMELA C. ROBBINS, NAT'L INST. OF JUST., DEVELOPING AND VALIDATING A BRIEF JAIL MENTAL HEALTH SCREEN FOR WOMEN 2 (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/220108.pdf ("[A]bout 900,000 detainees [of approximately thirteen million] met criteria for mental illness in the year prior to incarceration . . . ."); *see also* Kevin Johnson & Andrew Seaman, *Mentally Incompetent Defendants on The Rise*, USA TODAY, May 28, 2008, at 3A ("The number of accused felons declared mentally incompetent to stand trial is rising in 10 of the nation's 12 largest states, delaying local prosecutions and swamping state mental health and prison systems . . . ."); Brent Staples, Editorial, *How the Justice System Criminalizes Mental Illness*, N.Y. TIMES, Dec. 13, 2004, at A26 ("The prison mental health crisis . . . is . . . national in scope.").

3. *See* HUMAN RIGHTS WATCH, *supra* note 2, at 3 ("The penal network is . . . serving as a warehouse for the mentally ill."); *id.* at 1 ("[A]cross the nation, many prison mental health services are woefully deficient, crippled by understaffing, insufficient facilities, and limited programs."); W. David Ball, *Mentally Ill Prisoners in the California Department of Corrections and Rehabilitation: Strategies for Improving Treatment and Reducing Recidivism*, 24 J. CONTEMP. HEALTH L. & POL'Y 1, 5 (2007) ("Prisons fail to adequately screen inmates for mental illness during intake, fail to offer special programming or housing, [and] fail to provide basic treatment for many prisoners . . . ."); *see also* Editorial, *Treating Mentally Ill Prisoners*, N.Y. TIMES, Oct. 22, 2004, at A22 ("[T]he American prison system has evolved into something of a mental institution by default.").

suffer behind bars with serious illnesses.[4] Commentators have called for reforms relating to the criminal justice system's treatment of the mentally disabled.[5] For instance, some have pressed for the creation of specialized trial-level mental health courts,[6] which would divert impaired defendants from the standard prosecution path to court-ordered mental health treatment.[7] Others, including the Task Force of the ABA Section of Individual Rights and Responsibilities (ABA-IRR Task Force),[8] have urged prohibition of the

---

4. *See* HUMAN RIGHTS WATCH, *supra* note 2, at 1 ("[M]en and women in U.S. prisons suffer from mental disorders, including such serious illnesses as schizophrenia, bipolar disorder, and major depression.").

5. *See* Bonnie J. Sultan, *The Insanity of Incarceration and the Maddening Reentry Process: A Call for Change and Justice for Males with Mental Illness in United States Prisons*, 13 GEO. J. ON POVERTY L. & POL'Y 357, 358 (2006) ("[O]ur current prison environment is an inhumane placement for [the mentally ill]."); *see also* Ball, *supra* note 3, at 1 ("The poor treatment of California's mentally ill prisoners burdens the judicial system, drains the state's budget, and causes needless inmate suffering."); Staples, *supra* note 2, at A26 ("[M]entally ill people often enter the criminal justice system for offenses and aberrant behaviors related to their illnesses.").

6. *See* Carol Fisler, *Building Trust and Managing Risk: A Look at a Felony Mental Health Court*, 11 PSYCHOL. PUB. POL'Y & L. 587, 587 (2005) (discussing felony mental health courts); Michael Thompson, et. al., *Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court* vii (2007), *available at* http://www.ojp.usdoj.gov/BJA/pdf/MHC_Essential_Elements.pdf (describing elements and implementation of mental health courts); *see also* Mentally Ill Offender Treatment and Crime Reduction Act of 2004, Pub. L. No. 108-414, 118 Stat. 2327 (2000) (authorizing federal grant money for collaborative efforts between state-level criminal justice and mental health agencies, including mental health courts).

7. *See* Fisler, *supra* note 6, at 589 ("Mental health courts . . . link[] offenders with mental illness to treatment as an alternative to incarceration."); DEREK DENCKLA & GREG BERMAN, CTR. FOR COURT INNOVATION, RETHINKING THE REVOLVING DOOR: A LOOK AT MENTAL ILLNESS IN THE COURTS 7 (2001), *available at* http://www.courtinnovation.org_uploads/documents/rethinkingtherevolvingdoor.pdf ("One judicial experiment in particular has attracted a great deal of attention: the development of specialized 'mental health courts' that seek to link defendants to long-term treatment as an alternative to incarceration."); *see also* Editorial, *Treating Mentally Ill Prisoners*, *supra* note 3, at A22 ("The optimal solution would be to extend public health services right into the jails and prisons, so inmates can begin drug and therapy regimens the moment they walk into custody."). Many argue that such institutions merely perpetuate criminalization of conduct that is the result of impairment. *See, e.g.*, Tammy Seltzer, *Mental Health Courts: A Misguided Attempt to Address the Criminal Justice System's Unfair Treatment of People with Mental Illness*, 11 PSYCHOL. PUB. POL'Y & L. 570, 981 (2005) (discussing flaws of mental health court systems); *see also infra* Part V (calling for reform of criminal mental competency framework).

8. AM. BAR ASS'N, REPORT OF THE TASK FORCE ON MENTAL DISABILITY AND THE DEATH PENALTY (2005), *available at* http://www.apa.org/releases/mentaldisability anddeathpenalty.pdf. Catholic University Law Review held a symposium to examine the work of the Task Force and its recommendations. *See generally Symposium: The Death Penalty and Mental Illnesses*, 54 CATH. U. L. REV. 1113 (2005) (discussing the Task Force's position regarding the imposition of the death penalty on defendants with mental disability and the Task

execution of mentally impaired death row inmates.[9]

Conversations about the incarcerated mentally ill have failed, however, to address another important problem facing the criminal justice system—the effect of defendant impairment on the appellate process. That is, few have examined how mental incapacity may undermine the ability of defendants—in death penalty cases or otherwise—to challenge past convictions on appeal and whether criminal appellate processes should be reexamined as a result.[10]

Force's suggested procedures to safeguard these defendants from capital punishment); *see also* Richard Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1169 (2005) (discussing "problems relating to mental illness or other mental disabilities that arise *after* sentencing"); *Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1115, 1115 (2005) (addressing mental disorders and sentencing); Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133, 1133 (2005) (examining recommendations regarding imposing less culpability due to mental disability); Ronald J. Tabak, *Overview of The Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123, 1123 (2005) (describing the Task Force's formation in response to the Supreme Court decision of *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), which held that the execution of the mentally retarded violated the Eighth Amendment).

9. *See* Audio recording: American Bar Association Continuing Legal Education Teleconference, Mental Illness and the Death Penalty: New Hope for Those Threatened With Execution (June 3, 2008), *available at* http://www.abanet.org/irr/awards.html (describing an online training for lawyers and others to help prevent seriously mentally impaired persons from being executed). Capital defendants have also litigated this issue. *See, e.g.*, Colburn v. Cockrell, No. 02-21208, 2002 WL 31718026, at *1, *3 (5th Cir. Nov. 6, 2002) (refusing to issue a capital defendant, who argued he was incompetent to be executed, a certificate of appealability because he failed to raise the issue in a previous habeas petition and did not request leave to file a second petition), *cert. denied*, 537 U.S. 1166 (2003); Slawson v. Florida, 796 So. 2d 491, 503 (Fla. 2001) (finding that a capital defendant, deemed competent after examination by three mental health experts who testified at an adversarial hearing, could waive collateral counsel and proceedings); *see also* Stephen Blank, *Killing Time: The Process of Waiving Appeal: The Michael Ross Death Penalty Cases*, 14 J.L. & POL'Y 735, 738 (2006) (stating that "Death Row Syndrome complicates the issue of waiving appeal in death penalty cases"); Jeremy Burnette, *The Supreme Court "Sells" Charles Singleton Short: Why the Court Should Have Granted Certiorari to* Singleton v. Norris *After Reversing* United States v. Sell, 21 GA. ST. U. L. REV. 541, 542–43 (2004) (discussing the execution of mentally ill defendants and relevant Supreme Court precedent).

10. Even Harvard Law Review's important recent comprehensive publication, *Developments in the Law: The Law of Mental Illness*, which offers an extensive analysis of United States criminal mental capacity law and insightful suggestions that are in some ways consonant with the proposals herein, passed over the question of competence for purposes of direct appeal. *See Developments in the Law: The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1158 (2008) ("Competency determinations can take place at various phases of a prosecution, from arraignment to trial to execution, at the suggestion of either the defendant or the court."); *see also* Bonnie, *supra* note 8, at 1169 (addressing difficulties that occur subsequent to sentencing as a result of a defendant's mental illness).

Historically, although defendant competence for purposes of trial has received significant attention in case law and elsewhere, the problem of defendant incompetence on appeal has been largely ignored.

This Article seeks to fill this void. Specifically, it argues that criminal laws, standards, and practices have misapprehended this issue. Many defendants on appeal do suffer from serious mental illness, and such impairment can undermine the fairness of the appellate process. Thus, this Article makes an appeal—seeking reconceptualization of the concept of defendant competence to account for instances where defendant capacity may be essential to direct appeal proceedings. Towards this end, it urges creation of a more comprehensive and coherent set of ABA Criminal Justice Mental Health Standards. These new Standards can help to better contextualize the concept of client competence during the criminal process and foster client-centered representation for defendants. Such standards would be invaluable not just during trial, but on appeal and beyond.

This Article proceeds in Five Parts. Part II describes the constitutional framework announced in *Dusky v. United States*, state statutory schemes, and current American Bar Association (ABA) Criminal Justice Mental Health Standards that work to protect mentally incompetent defendants at trial. It also explains how contemporary trial-level processes and defense lawyering practices facilitate discovery of impairment. Lower court decisions have also worked to firmly root the *Dusky* trial-level competence standard.

Part III notes that the Supreme Court has said little about mentally impaired defendants on appeal. It looks at the limited, and this author believes misguided, ABA Standards on this topic. Contrasting present day appellate-level processes and representation norms with those relating to trial, it also sheds light on how the former contributes to the invisibility of criminal appellant mental impairment issues. It further outlines the history of lower courts ignoring the problem of appellate-level incompetence by relying on the ABA Mental Health Standards.

Part IV urges the deconstruction of the *Dusky* framework as a legal monolith to permit for a more contextualized approach to competence throughout the criminal process—including direct appeals. It begins by critiquing the lower court trend that ignores the significance of appellant impairment and highlights an important counter-trend that offers a more nuanced approach to the question of competence in criminal cases. These cases, including the Seventh Circuit's decision last year in *Holmes v. Buss*, correctly acknowledge that in many instances appellate-level client competence is essential to due process of law as well as provision of effective assistance of counsel. It also suggests that the Supreme Court's significant decision earlier this year in *Indiana v. Edwards* has finally opened the door for the development

of a more individualized approach to the concept of competence, one that more appropriately takes account of the context in which questions of competence arise. Thus, it calls for reconceptualization of competence in criminal matters, beginning with redrafting of the ABA's Criminal Justice Mental Health Standards.

In rethinking the idea of competence across all parts of the criminal process, the Standards should not only properly recognize the right to competence during direct appeals, but propose a procedural model to address such incompetency claims and a meaningful remedial scheme for incompetent appellants in light of the context of the proceedings. This paper concludes by offering some general thoughts and considerations for redrafting the Standards to improve criminal justice practices relating to mentally ill prisoners in this country.

II. Trial Level Competence: A Recognized and Protected Right

A. Dusky v. United States*: Constitutional Competence Touchstone*

Nearly fifty years ago, the Supreme Court first recognized the inherent unfairness of having seriously mentally impaired criminal defendants stand trial in *Dusky v. United States*.[11] In this one-page decision, the Court announced a two-part inquiry for determining whether a defendant is so impaired as to render him incompetent, holding that if an accused is found to lack competence he cannot be subjected to the rigors of trial.[12] This now well-known test requires a defendant to have, first, sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and, second, a rational as well as a factual understanding of the proceedings against him.[13] The first part of the test, thus, focuses on a defendant's ability to communicate with and assist his lawyer.[14] The second part deals with the defendant's

11. *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (finding the defendant entitled to a new competency hearing given the uncertainties about the psychiatric testimony's legal weight and the problem of retroactively ascertaining the defendant's competency).

12. *Id.* at 402–03.

13. *Id.* at 402.

14. *Id.* at 402–03; *see* Drope v. Missouri, 420 U.S. 162, 171 (1975) (holding that the defendant's competence includes "the capacity . . . to consult with counsel, and to assist in preparing his defense"); John T. Philipsborn, *Searching for Uniformity in Adjudications of the Accused's Competence to Assist and Consult in Capital Cases*, 10 PSYCHOL. PUB. POL'Y & L. 417, 422 (2004) ("[C]ompetence inquiries involve a number of elements, including careful assessment of the accused's ability to interact with counsel.").

comprehension of concepts like the nature of the charges against him and the possible outcomes of the prosecution.[15]

Notably, while seemingly straightforward and rooted in common sense,[16] neither prong of the test finds its genesis in medical or mental health literature. Rather, the Court announced the standard without mentioning any scientific support to explain why this measure of capacity would be appropriate in the trial context, or how to gauge the concepts of understanding or rationality.[17]

Since *Dusky*, the Court has explained that based on common law principles, defendant competence is "fundamental to an adversary system of justice" and essential to due process of law.[18] At trial a defendant will need to make reasoned decisions in light of possible consequences, such as whether to testify, waive a jury, or raise certain defenses.[19] An incompetent defendant is forced to make important decisions without understanding the risks.[20] The

---

15. *Dusky*, 362 U.S. at 402–03; *see Drope*, 420 U.S. at 171 (holding that the defendant must have "the capacity to understand the nature and object of the proceedings against him").

16. *See* Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1376 (2006) (explaining that *Dusky*'s "surface clarity . . . disguises a fundamental lack of transparent meaning").

17. *See* Dusky v. United States, 362 U.S. 402, 402–03 (1960) (announcing its new test in four sentences with no reference to scientific evidence); *see also* Maroney, *supra* note 16, at 1379 ("[T]he *Dusky* standard is also highly unpredictable in application, in large part because the task of implementing *Dusky* generally falls to forensic experts, to whom courts defer heavily but to whom firm guidance as to the legal standard is seldom given.").

18. *Drope*, 420 U.S. at 172; *see also* Cooper v. Oklahoma, 517 U.S. 348, 369 (1996) (finding the Oklahoma competency standard unconstitutional because it permitted the trial of a "more likely than not incompetent" defendant); Medina v. California, 505 U.S. 437, 452 (1992) (determining that a state may require a defendant to prove incompetence by a preponderance of the evidence); Jackson v. Indiana, 406 U.S. 715, 738 (1972) (holding that states cannot indefinitely detain defendants to determine competency); Pate v. Robinson, 383 U.S. 375, 385 (1966) (holding that the defendant was constitutionally entitled to a competency hearing).

19. *See* Godinez v. Moran, 509 U.S. 289, 398 (1993) ("A defendant who stands trial is likely to be presented with choices that entail relinquishment of the same rights that are relinquished by a defendant who pleads guilty . . . ."); *see also* AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.1, cmt. at 170 (1988) [hereinafter ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS] ("[D]efendants require a minimal understanding of the nature of criminal proceedings, the importance of presenting available defenses, and the possible consequences of either conviction or acquittal.").

20. *See* Cooper v. Oklahoma, 517 U.S. 348, 364 (1996) ("[T]he defendant also is called upon to make myriad smaller decisions concerning the course of his defense. The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a 'fundamental component of our criminal justice system'—the basic fairness of the trial itself."); *see also* Rodney J. Uphoff, *The Decision to Challenge the Competency of a Marginally Competent Client: Defense Counsel's Unavoidably Difficult Position*, *in* ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 31 (Rodney J. Uphoff ed., 1995) (arguing that competence relates to the "client's ability to interact with counsel, process information, participate appropriately in court, and make informed decisions").

Court has also noted that defendant competence is "rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel . . . ."[21] Thus, for example, an attorney's effectiveness at trial may be impaired if his client cannot convey what happened at the time in question, the circumstances of the alleged incident or who might be needed as a witness at trial, and potential areas of cross-examination for the prosecutor's witnesses.[22]

According to the Court, trial judges have an affirmative duty to monitor defendant competence regardless of what counsel says or does.[23] Trial courts have been exhorted to remain alert to signs suggesting that a defendant may be impaired, such as odd demeanor in the courtroom, irrational behavior, or past medical evidence of mental illness, and take action to protect a defendant's rights at the time questions regarding competence arise.[24] This duty lasts throughout the trial as a defendant who appears competent at the outset of proceedings may later manifest signs of incompetence.[25]

When defendant incompetence becomes an issue, some meaningful method of determining whether the defendant meets the *Dusky* standard must be afforded by the trial court. A defendant is entitled, therefore, to a competence hearing at which experts may be called to testify about the defendant's fitness to proceed in light of the *Dusky* standard.[26] Absent such a hearing, a questionably competent defendant is denied his "constitutional right to a fair trial."[27]

---

21. Medina v. California, 505 U.S. 437, 457 (1992); *see also Cooper*, 517 U.S. at 354 (discussing the long-standing history of the competence standard).

22. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, 7-4.1, cmt. at 170 ("Because the fundamental purpose of the rule is to promote accurate factual determinations of guilt or innocence by enabling counsel to evaluate and present available defenses . . . defendants should have at least the intellectual capacity necessary to consult with a[n] . . . attorney about factual occurrences giving rise to the . . . charges.").

23. *See* Drope v. Missouri, 420 U.S. 162, 181 (1975) (stating that courts must be ever-vigilant for signs that a defendant is not competent to stand trial).

24. *Id.* at 180 ("[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required . . . .").

25. *See, e.g.*, *id.* at 181 ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."); State v. Douglas, No. COA06-1396, 2007 WL 2034129, at *4 (N.C. Ct. App. July 17, 2007) (acknowledging a trial court's duty to *sua sponte* conduct a competency hearing if it has serious doubts about a defendant's competence to stand trial).

26. *See* Pate v. Robinson, 383 U.S. 375, 376–77 (1966) (finding the defendant entitled to a concurrent competency determination as recognized by *Dusky*).

27. *Id.* at 385.

If he is found incompetent to stand trial, a defendant may be hospitalized or treated until such time as he attains competence.[28] Hospitalization prior to a finding of guilt may not be indefinite, however.[29] Rather, the Court established in *Jackson v. Indiana*[30] that such detention, absent civil commitment proceedings, may extend only for a reasonable period of time sufficient to permit a determination of whether the defendant "will attain . . . capacity in the foreseeable future."[31] If it is established that the defendant likely will not become competent in the foreseeable future, the state must either institute civil commitment proceedings or release the defendant and dismiss the charges.[32] Thus, defense attorneys may seek dismissal of charges after some reasonable period of time when it appears clients found incompetent are so ill that they likely cannot ever meaningfully assist in the defense or appreciate the nature of the proceedings against them.

B. Statutory Schemes

Every state has now adopted statutory schemes to conform with the Court's constitutional framework and ensure that no one is forced to stand trial while incompetent.[33] Article 730 of New York's Criminal Procedure Law is

---

28. *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972) (holding that states cannot indefinitely detain defendants when incompetency is the sole reason for detention).

29. *Id.*; *see also* Jones v. Unites States, 463 U.S. 354, 368 (1983) (holding that a defendant found guilty of committing a criminal act, but "insane" at the time, could be hospitalized until he regained "sanity"—even if that meant a period of hospitalization longer than the maximum potential prison sentence the act carried).

30. *See Jackson*, 406 U.S. at 738 (holding that states cannot indefinitely detain defendants when incompetency is the sole reason for detention).

31. *Id.*

32. *Id.*

33. *See, e.g.*, ALA. CODE § 15-16-20 (1995) ("If any person other than a minor in confinement, under indictment . . . appears to be insane, the judge of the circuit court of the county where he is confined must institute a careful investigation, call a respectable physician and call other credible witnesses . . . ."); ALASKA STAT. § 12.47.070 (2006) (stating that if the court doubts the defendant's fitness to proceed "the court shall appoint at least two qualified psychiatrists or two forensic psychologists . . . to examine and report upon the mental condition of the defendant"); CAL. PENAL CODE § 1368 (West 2007) (stating that if prior to a final judgment the judge doubts the defendant's mental competence, "he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent"); GA. CODE ANN. § 17-7-130 (2008) ("Whenever a plea is filed that a defendant in a criminal case is mentally incompetent to stand trial, it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be tried first by a special jury."); 725 ILL. COMP. STAT. 5/104-11 (2006) ("The issue of the defendant's fitness for trial, to plead, or to be sentenced may be raised by the defense, the State

typical.[34] Article 730 sets forth a comprehensive framework for determining competence, including examination by mental health experts and holding a hearing for a final judicial determination on the issue.[35] Article 730 also requires trial judges to order competency exams whenever they question a defendant's capacity, regardless of the positions of defense counsel or the prosecution, so that the issue can be meaningfully addressed in a timely fashion.[36]

If the court finds a defendant is incompetent, trial is suspended.[37] The *remedy* is that the defendant is hospitalized or "retained" for a period of observation until he attains the capacity to stand trial.[38] If the defendant does not become fit to proceed within a period of time equal to two-thirds of the maximum sentence possible on the highest-count charged, the indictment must be dismissed.[39]

---

or the Court at any appropriate time before a plea is entered or before, during, or after trial."); OKLA. STAT. ANN. tit. 22, § 1175.2 (West 2003) ("No person [is] subject to any criminal procedures after the person is determined to be incompetent . . . ."); TENN. CODE. ANN. § 33-7-301 (2007) ("When a defendant charged with a criminal offense is believed to be incompetent to stand trial . . . [the judge may] order the defendant to be evaluated on an outpatient basis."); VA. CODE ANN. § 19.2-169.1 (2007) ("If at any time after the attorney for the defendant has been retained or appointed and before the end of trial, the court finds . . . that there is probable cause to believe that the defendant . . . lacks substantial capacity to understand the proceedings . . . the court shall order . . . a competency evaluation . . . ."); WYO. STAT. ANN. § 7-11-302 (1995) ("No person shall be tried, sentenced or punished for the commission of an offense while, as a result of mental illness or deficiency, he lacks the capacity, to [understand the proceedings]."); *see also* 18 U.S.C. § 4244 (2006) (providing the federal trial-level competence statute). Some states, like New York, had competency statutes on the books already. *See* People v. Valenino, 356 N.Y.S.2d 962, 963–68 (N.Y. Co. Ct. 1974) (discussing the history of the law of competency to stand trial in New York, dating back to the 1840s).

34. N.Y. CRIM. PRO. LAW § 730.10-730.70 (Consol. 1995).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* § 730.50(3). Interestingly, New York's statutory maximum period of hospitalization (equal to two-thirds of the maximum sentence) for purposes of establishing pre-trial competence pre-dated the Court's decision in *Jackson*. *See* Jackson v. Indiana, 406 U.S. 715, 733–34 n.13 (1972) ("New York has recently enacted legislation mandating release of incompetent defendants charged with misdemeanors after 90 days of commitment, and release and dismissal of charges against those accused of felonies after they have been committed for two-thirds of the maximum potential prison sentence."). The wisdom of such a non-scientifically based, arbitrary numeric cap is questionable. *See, e.g.*, Douglas Mossman, *Predicting Restorability of Incompetent Criminal Defendants*, 35 J. AM. ACAD. OF PSYCHIATRY & L. 34, 34 (2007) ("[N]o jurisdiction has established legal guidelines for testimony concerning restorability, and several authors have suggested that mental health professionals cannot accurately predict whether treatment to restore competence will succeed . . . .").

Significantly, Article 730, typical of other modern state statutes, provides that the issue of competence must be raised "*before* imposition of sentence."[40] Thus, the parties and the court are without statutory power to seek defendant evaluation or a competency determination after sentencing and trial-level proceedings have concluded.

C. Comprehensive ABA Standards

Not only have each of the individual states created statutory mechanisms for protecting the rights of impaired defendants facing trial, but in 1986 the ABA House of Delegates published its Criminal Justice Mental Health Standards to guide policymakers, practitioners, and courts on the issue of defendant incapacity.[41]

---

40. N.Y. CRIM. PRO. LAW § 730.30 (1) (Consol. 1995) (emphasis added); *see also* ALASKA STAT. § 12.47.100 (2006) ("A defendant who is incompetent . . . may not be tried, convicted, or sentenced for the commission of a crime so long as the incompetency exists."); ALASKA STAT. § 12.47.060 (2006) ("A [competency] hearing must be held on the issue at or before the sentencing hearing."); CONN. GEN. STAT. ANN. § 17a-566 (West 2006) ("[A]ny court prior to sentencing a person of an offense . . . [may] order the commissioner to conduct an examination of the convicted defendant by qualified personnel of that division."); DEL. CODE ANN. tit. 11, § 405 (2007) ("Whenever the court is satisfied that a prisoner has become mentally ill after conviction but before sentencing . . . the court may order the prisoner to be confined and treated in the Delaware Psychiatric Center . . . ."); IND. CODE ANN. § 35-36-3-1 (1998) ("If at any time before the final submission of any criminal case to the court or the jury . . . the court has reasonable grounds for believing . . . the defendant [is incompetent], the court shall immediately fix a time for a hearing to determine whether the defendant has that ability [to proceed]."); KAN. STAT. ANN. § 22-3302 (2007) ("At any time after the defendant has been charged with a crime and before pronouncement of sentence, the defendant, the defendant's counsel or the prosecuting attorney may request a [competency hearing]."); MONT. CODE ANN. § 46-14-103 (2007) ("[Mental incapacity prevents a defendant from being] tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures."); PA. STAT. ANN. § 50-7402 (West 2001) ("[A defendant may be deemed] incompetent to be tried, convicted or sentenced so long as such incapacity continues."); VA. CODE. ANN. § 19.2-169.1 (2007) (stating that the competence issue may be raised "before the end of the trial"); WYO. STAT. ANN. § 7-11-302 (1995) ("No person shall be tried, sentenced or punished for the commission of an offense while, as a result of mental illness or deficiency, he lacks the capacity to [understand the proceedings]."); *cf.* People v. Freyre, 348 N.Y.S.2d 845, 847 n.2 (N.Y. Sup. Ct. 1973) (referring to N.Y. CRIM. PRO. LAW §§ 658–62, applicable in the 1950s, entitled "Inquiry into the Insanity of the Defendant Before or During the Trial, or After Conviction").

41. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, introductory cmt. at xvi–xvii (stating that the ABA's Criminal Justice Mental Health Standards Project formally began in 1981 and "[i]ts ninety-six black-letter standards were approved by the Association's House of Delegates on August 7, 1984"); *see also id.* at xv (stating that most of the Mental Health Standards were first published in 1986 and that new standards relating to competence and capital punishment were added in 1987).

Specifically, Part IV of this over 500-page volume is a 100-page chapter titled "Competence to Stand Trial."[42] That chapter details and expands on the requirements of *Dusky* and its progeny through a variety of recommendations.[43] The ABA urges trial judges to fulfill their duty to monitor competence at trial and to take action to protect the defendant's rights if the issue arises.[44] The ABA Standards also propose detailed procedures for practitioners seeking to raise the issue of mental capacity at trial. They deal with some of the complicated ethical situations that may arise in such situations.[45] Examples include discussion of the actions an attorney should take if he believes it is not in his client's interest to raise the issue of competency, or if his client opposes the issue being raised.[46]

D. The Trial Setting: Incapacity Readily Revealed

Beyond this, trial court norms and practices afford counsel and judges various opportunities to discover defendant incapacity. For instance, most defendants see an attorney each time they appear before the court as well as in meetings prior to such appearances.[47] The Sixth Amendment to the Constitution requires free representation for indigent defendants during all critical stages of the trial process—from initial presentment and preliminary hearings,[48] to suppression

---

42. *Id.* at pt. IV, 157–258.

43. *Id.* at introductory cmt. at 164 ("The standards first address the definitional criteria for a finding of incompetence, incorporating almost without change the test set forth in the case of *Dusky v. United States*.") (citations omitted).

44. *Id.* 7-4.2 ("The court has a continuing obligation, separate and apart from that of counsel . . . to raise the issue of competence . . . at any time the court has a good faith doubt as to the defendant's competence, and may raise the issue at any stage of the proceedings on its own motion.").

45. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, 7-4.2, introductory cmt. at 177 (recognizing that defense counsel face ethical quandaries when representing an individual he fears may be incompetent, as counsel "has an independent professional responsibility toward the court and the fair administration of justice, as well as an allegiance to the client").

46. *See* Uphoff, *supra* note 20, at 30–41 (discussing defense counsel's role regarding the issue of a defendant's competence).

47. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued . . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

48. Only last year did the Court expand the right to counsel rule to initial presentments, resulting in such proceedings now being considered a critical part of the prosecution process. *See* Rothgery v. Gillespie County, 128 S. Ct. 2578, 2592 (2008) ("[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his

hearings, trial, and sentence.[49] Beyond this, ethical rules and defense practice guidelines reinforce the importance of attorney interaction with defendants during all stages of trial-level representation, providing defense attorneys with many chances to gauge client capacity to assist in the defense and understand the proceedings.[50]

Trial judges, similarly, have numerous opportunities to engage defendants throughout the trial process. From arraignment on, a defendant appears in person before the court.[51] Judges speak with defendants to inform them of the nature of the charges against them, bail conditions, and the like.[52] Courts also converse with defendants during guilty plea colloquies to determine whether they are waiving their right to trial knowingly, intelligently, and voluntarily.[53] Allocution at sentencing is another opportunity for courts to engage the defendant.[54] And, of course, defendants' presence in courtrooms, even when

---

liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.").

49. *See* U.S. CONST. amend. VI ("In all criminal proceedings, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

50. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2007) ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished."). *See generally* NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION 2-2, cmt. at 40–41 (1997) (describing an attorney's duty to communicate effectively with clients).

51. *See* FED. R. CRIM. P. 10(a)(1)–(3) ("An arraignment must be conducted in open court and must consist of: (1) ensuring that the defendant has a copy of the indictment or information; (2) reading the indictment or information to the defendant . . . ; and then (3) asking the defendant to plead to the indictment or information."); FED. R. CRIM. P. 43(a)(1)–(3) ("[T]he defendant must be present at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing."); MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990) ("A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.").

52. *See* U.S. CONST. amend. VI ("In all criminal prosecutions . . . the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."); FED. R. CRIM. P. 5.1(a) ("If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing . . . .").

53. *See* FED. R. CRIM. P. 11(b)(1) ("Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court."); FED. R. CRIM. P. 23(a)(1)–(3) ("If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves."); Boykin v. Alabama, 393 U.S. 238, 243 n.5 (1969) ("[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.").

54. *See* FED. R. CRIM. P. 32(i)(4)(a)(ii) ("Before imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence . . . ."); *see also* Kimberly Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2643–45 (2007) (noting that

not speaking, allows trial judges the opportunity to observe their affect, demeanor, grooming, and other physical characteristics that may shed light on their mental health.

Thus, not only do Supreme Court pronouncements, legislative enactments, and ABA Standards all work to protect the rights of mentally impaired criminal defendants during the pendency of a trial, but the very nature of the trial process lends itself to discovering the possibility of defendant incapacity.

E. Application and Entrenchment of Dusky

These aspects of trial procedure allow for claims of trial-level incompetence to be meaningfully litigated on appeal. Reported decisions are filled with descriptions, based on the records from the proceedings below, of unusual defendant demeanor, odd interactions with the court, and inability to assist counsel. Often such cases result in remand for review of the question of trial competence.[55]

Unfortunately, the impressive body of law that has developed in the nearly fifty years since *Dusky* has also worked to entrench its framework as the touchstone for competence in criminal cases.[56] Indeed, despite its apparent lack of grounding in modern scientific or medical evidence, the two-part test has become a legal mantra on questions of competence.[57] It is often uttered with little thought about what it might really mean to be competent for purposes of trial and minimal consideration of the circumstances at hand.[58] Even when defendants have been unrepresented at trial, for instance, courts have repeatedly

---

allocution affords criminal defendants an important opportunity to converse with the judge).

55. *See* Philipsborn, *supra* note 14, at 421 n.10 (discussing cases remanded to the trial court because the issue of competence was not adequately detailed in the record); *id.* at 421 (describing the extent to which capital defense attorneys may raise trial competence issues on appeal or during collateral proceedings).

56. A Westlaw search in the "allcases" database with the terms "competence" and "Dusky" yielded 1,535 results.

57. *See supra* notes 16–18 and accompanying text (discussing *Dusky* as rooted in common sense principles rather than scientific justifications).

58. *See* Maroney, *supra* note 16, at 1379 ("The meaning of each term embedded within the *Dusky* standard—notably the distinction between a 'rational' and a 'factual' understanding—has escaped significant elaboration by courts and theorists."); Philipsborn, *supra* note 14, at 422 (discussing the "basic and literal" approach to competence contemplated by *Dusky*'s one-page opinion, as compared to modern developments in mental health science that are much more complex and nuanced).

considered *Dusky*'s second-prong relating to their ability to communicate with counsel.[59]

Moreover because the mantra focuses on the term "trial" when considering defendant capacity, it has helped to preclude any serious consideration of whether defendant capacity might be essential on appeal. Indeed, the criminal justice system has been relatively unconcerned with a defendant's capacity to participate in legal proceedings outside of the trial court setting.

III. Appellate-Level Mental Impairment: A Problem Long Ignored

Under the ABA's Criminal Justice Mental Health Standards and state statutory schemes, seriously impaired appellants are not afforded the same rights relating to competence as they might be at trial. Rather, despite possible significant mental disabilities, defendants are expected to be able to pursue their direct appeals. Sadly, the nature of the appellate process likely contributes to the invisibility of defendant impairment during direct review. And in light of the lack of guidance from the Supreme Court, appellate courts have relied largely on the ABA's Criminal Justice Mental Health Standards to ignore defendant incapacity on appeal. Attorneys for impaired defendants historically have been instructed to simply stand in the shoes of their clients and prosecute direct appeals on their behalf.

A. Lack of Constitutional Protections and Framework

In stark contrast to defendants involved in criminal trials, those with pending criminal appeals generally are not afforded competency protections and procedures. This is true despite the fact that many defendants may suffer from severe mental impairment during the direct appeal stage of the criminal process.[60] In fact, the Supreme Court has never addressed the question of whether a defendant has a continuing right to competence to participate in the

59. *See, e.g.*, Muhammad v. McDonough, No. 3:05-cv-62-J-32, 2008 WL 818812, at *2 (M.D. Fla. Mar. 26, 2008) (applying the *Dusky* standard for competence in evaluating the appeal of a defendant who had represented himself in the trial court).

60. *See, e.g.*, Panetti v. Quarterman, 127 S. Ct. 2842, 2845 (2007) (acknowledging that "[a]ll prisoners are at risk of deteriorations in their mental state," even when there are no earlier signs of mental illness); *see generally* HUMAN RIGHTS WATCH, *supra* note 2, at 17 ("Persons with mental illness are disproportionately represented in correctional institutions.").

appellate process, nor has it extended the *Dusky* standard to defendants who undertake direct appeals from conviction.[61]

The Supreme Court has, however, looked at defendant competence beyond the trial court phase in two limited situations relating to the capital punishment context. In the first set of cases, the Court examined whether defendants were capable of understanding the consequences of forgoing post-judgment proceedings entirely and consenting to execution. In *Rees v. Peyton*,[62] the landmark case on this issue, the Court considered whether a capital defendant with mental health issues should be permitted to withdraw a certiorari petition challenging the denial of federal habeas relief and accept his death sentence.[63] In doing so, the Court crafted a standard that appears to differ somewhat from the one set forth in *Dusky* for assessing capacity to "volunteer" for execution.[64] It asked the trial court to determine whether the petitioner "has

---

61. *See* United States v. Gigante, 996 F. Supp. 194, 196–200 (E.D.N.Y. 1998) (discussing the history and contours of the *Dusky* standard and its limitation to the trial and sentencing phases of a criminal proceeding).

62. *See* Rees v. Peyton, 384 U.S. 312, 315 (1966) (concluding that until the trial court had decided whether the defendant had been suffering from mental illness which might substantially affect his capacity to make a rational decision, the Court could not decide how to dispose of the petition for certiorari, but would retain jurisdiction over the case). For an excellent, in-depth analysis of the *Rees* decision and the Court's subsequent unusual treatment of Rees's case, see Phyllis L. Crocker, *Not to Decide is to Decide: The U.S. Supreme Court's Thirty-Year Struggle with One Case About Competency to Waive Death Penalty Appeals*, 49 WAYNE L. REV. 885, 887–91, 914–21 (2004).

63. *See Rees*, 384 U.S. at 313 ("Nearly one month after his petition had been filed, Rees directed his counsel to withdraw the petition . . . . Counsel advised this Court that he could not conscientiously accede to these instructions without a psychiatric evaluation of Rees because evidence cast doubt on Rees'[s] mental competency.").

64. Some, however, have suggested that the tests for competence set forth in *Dusky* and *Rees* are essentially identical. *See, e.g.*, Corcoran v. Buss, 483 F. Supp. 2d 709, 730 (N.D. Ind. 2007) ("We are constrained to say we find little if any difference between the standards enunciated in *Dusky* and *Rees*."); C. Lee Harrington, *Mental Competence and End-of-Life Decision Making: Death Row Volunteering and Euthanasia*, 29 J. HEALTH POL. POL'Y & L. 1109, 1113 (2004) (indicating that the *Rees* test follows the *Dusky* standard); J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 168 (2006) (identifying *Rees* as controlling authority in volunteer contexts, which follows the *Dusky* standard when considering "'whether a defendant [can] . . . make a rational choice with respect to continuing or abandoning further litigation or . . . whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity'" (quoting Rees v. Payton, 384 U.S. 312, 314 (1966))); *see also* Godinez v. Moran, 509 U.S. 389, 398 n.9 (1993) ("We have used the phrase 'rational choice' in describing the competence necessary to withdraw a certiorari petition, *Rees v. Peyton* . . ., but there is no indication in that opinion that the phrase means something different from 'rational understanding.'" (quoting Rees v. Payton, 384 U.S. 312, 314 (1966))). This author believes there is some difference between these two standards, which in some cases could be significant. *See* Awkal v. Mitchell, 174 Fed. App'x. 248, 250–51 (6th Cir. 2006) (Gilman, J., concurring

capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."[65] As in *Dusky*, this standard was announced without any reference to, or basis in, medical science or mental health literature and did not detail what kind of mental disorder might result in an incompetence finding.[66]

In the second category of capital cases in which post-judgment competence was an issue, the Court looked at the question of post-judgment competence for purposes of execution.[67] *Ford v. Wainwright*[68] involved a defendant who "began to manifest gradual changes in behavior" after spending over a decade on death row and developing a severe mental disorder that caused psychotic and highly delusional thought processes.[69] The Court reversed the denial of Ford's request for habeas corpus relief and remanded for an evidentiary hearing on "the question of his competence to be executed,"

---

and dissenting in part) (recognizing a difference between the *Rees* test and the trial-level competency test). The difficulty in discerning the contours of these rules is one of the problems with current competency jurisprudence and practice, which is discussed *infra* Part IV.

65. *Rees*, 384 U.S. at 313.

66. In subsequent reported decisions when defendants volunteered for death, either by waiving direct appeals or collateral attacks on their convictions, the Court was faced with individuals seeking next friend status in order to intervene to prevent an execution. In each case, next friend status was denied because the intervenor failed to show that the inmate did not understand the consequences of his decision to volunteer. Thus, the *Dusky* standard was not applied. Rather, the Court generally invoked some version of the *Rees* test to assess competence in this context. *See, e.g.*, Demosthenes v. Baal, 495 U.S. 731, 736 (1990) ("In the absence of any 'meaningful evidence' of incompetency, . . . the District Court correctly denied petitioners' motion for a further evidentiary hearing on the question of Baal's competence to waive his right to proceed.") (citing Whitmore v. Arkansas, 495 U.S. 149, 166 (1990)); Whitmore v. Arkansas, 495 U.S. 149, 163 (1990) ("[A] 'next friend' must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action."); Gilmore v. Utah, 429 U.S. 1012, 1012–16 (1976) (declining to grant the next friend petition sought by the mother of a defendant sentenced for execution because the evidence failed to suggest that the defendant was "unable to seek relief on his own behalf"). Notably, the Court has not distinguished between direct appeals and post-conviction proceedings in the competence-to-volunteer cases. *See, e.g.*, *Demosthenes*, 495 U.S. at 736 (finding the defendant competent to waive his right to post-conviction relief using the same standard to assess competency as in *Whitmore*, a case that involved waiver of direct appeal rather than post-conviction proceedings).

67. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002) (concluding that states cannot execute mentally retarded criminal defendants); Ford v. Wainwright, 477 U.S. 399, 410 (1986) (stating that states cannot execute insane criminal defendants).

68. *See Ford*, 477 U.S. at 401–05 (concluding that states are constitutionally barred from executing the mentally insane under the Eighth Amendment).

69. *Id.*

explaining that "[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."[70] However, it did not offer a standard for incompetence, as had been done with incompetency for trial under *Dusky* or incompetence to volunteer for death under *Rees*.[71] Nor did it outline specific procedures for states to follow to ascertain whether a death row inmate lacks the capacity necessary for execution.[72]

The "incompetence for execution" rule was expanded in *Atkins v. Virginia*[73] to preclude, under the Eighth Amendment, the imposition of death as a sentence for mentally retarded defendants.[74] Again, however, it left open the question of what would count as mental retardation.[75] This has led to confusion and disparity in the treatment of retardation claims across jurisdictions.[76]

Last year, in *Panetti v. Quarterman*,[77] the Court attempted to offer some guidance to lower courts faced with Eighth Amendment *Ford* claims of incompetence for purposes of execution.[78] It confirmed that states must

---

70. *Id.* at 410, 417–18.

71. *See id.* at 409 (noting that the "Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane," but failing to set forth a specific competence-for-death standard); *id.* at 422 (Powell, J., concurring) ("I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."); *id.* (Marshall, J., concurring) (stating that the Eighth Amendment precludes carrying out the death sentence upon "one whose mental illness prevents him from comprehending the reasons for the penalty"); *see also* Panetti v. Quarterman, 127 S. Ct. 2842, 2860 (2007) ("The opinions in *Ford*, it must be acknowledged, did not set forth a precise standard for competency.").

72. *Ford*, 477 U.S. at 416 ("We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."); *see also Panetti*, 127 S. Ct. at 2855–58 (noting that *Ford* suggested basic minimum processes but did not detail specifically what they must be).

73. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (concluding that the mentally retarded are categorically excluded from death penalty eligibility).

74. *See id.* (finding that the execution of mentally retarded convicted defendants amounts to "cruel and unusual punishment" under the Eighth Amendment).

75. *Id.* at 417 ("[W]ith regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986))).

76. *See* Van Tran v. Tennessee, 128 S. Ct. 532, 532 (2007) (denying writ of certiorari on petitioner's claim that Tennessee statutory law and procedure precluded proper finding of petitioner's retardation under *Atkins*). Professor Penny White and the University of Tennessee Death Penalty Clinic drafted Mr. Van Tran's certiorari petition.

77. *See* Panetti v. Quarterman, 127 S. Ct. 2842, 2855 (2007) (concluding that the state court failed to provide the defendant with the necessary procedures to determine competence required by *Ford*).

78. *See id.* at 2858 ("After a prisoner has made the requisite threshold showing [of

provide some meaningful process to permit such claims to be presented once adequately raised, including an opportunity to be heard and present expert or other evidence.[79] Failure to do so violates procedural due process requirements.[80] Yet the Court again declined to provide a standard for measuring incompetency for purposes of execution, inviting further criticism about the lack of guidance provided to courts and practitioners on this issue.[81]

B. Statutory Silence

Legislatures have also failed to address the issue of competence on appeal. No state legislature has created a statutory mechanism for dealing specifically with the issue of appellate-level defendant incompetency. There are state competency statutes that seek to codify the *Dusky* framework, but they focus on the trial process, with some explicitly terminating the ability to seek evaluation and hearing at the time a sentence is pronounced.[82]

---

incompetence], *Ford* requires, at a minimum, that a court allow a prisoner's counsel the opportunity to make an adequate response to evidence solicited by the state court.").

79. *See id.* at 2856–58 (stating that after the defendant's threshold showing of incompetence is met, he is entitled to "an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court").

80. *See id.* at 2856 ("In light of this showing, the state court failed to provide petitioner with the minimum process required by *Ford*."). In any event, such claims usually are not cognizable until the eve of execution, once all appeals and post-conviction proceedings have concluded. *See* Bonnie, *supra* note 8, at 1178 (noting that "courts typically will not entertain claims of incompetence for execution until all avenues of collateral relief have been exhausted"); *see also* Herrera v. Collins, 506 U.S. 390, 406 (1993) ("[T]he issue of sanity is properly considered in proximity to the execution.").

81. *See Panetti*, 127 S. Ct. at 2868 (explaining that defendants who "cannot reach a rational understanding of the reason for the execution" may not be put to death, but "not attempt[ing] to set down a rule governing all competency determinations"); *see also* Michael Perlin, *Insanity is Smashing Up Against My Soul:* Panetti v. Quarterman *and Questions That Won't Go Away*, (New York Law Sch. Legal Studies Research Paper, Paper No. 07/08-25), *available at* http://ssrn.com/abstract=1130890 (discussing the evolution of the Supreme Court's competency analysis and noting there remain many issues involving mental capacity yet to be addressed); *Developments in the Law: The Law of Mental Illness*, *supra* note 10, at 1158 (noting that in *Panetti* "the Court more eagerly analyzed and engaged with the procedural issues of the case, passing on important opportunities to lay down even minimal substantive standards").

82. *See, e.g.*, CAL. PENAL CODE § 1367 (Deering 2007) ("A person cannot be tried or adjudged to punishment while that person is mentally incompetent."); *id.* § 1368 (providing for inquiry into defendant's mental competence when doubts arise "prior to judgment"); CONN. GEN. STAT. § 54-56d (2007) (stating that defense counsel may request a mental examination for the defendant "any time during a criminal proceeding"); MINN. STAT. § 611.026 (2006) ("If during the pending proceedings [anyone] has reason to doubt the competency of the defendant, then [they] shall raise that issue."); MISS. CODE ANN. § 99-13-1

It is only in the death penalty arena that the question of post-adjudication competence has been covered expressly by state statute. Again, however, the focus has been on mental capacity for purposes of having a death sentence carried out—not on the defendant's ability to competently engage in a challenge to the sentence.[83]

C. *ABA's Limited Standards*

The ABA's Criminal Justice Mental Health Standards do expressly address the question of defendant competence for purposes of non-capital

---

(2006) (stating if there is a question of competency, "before or during trial . . . the court shall order the defendant to submit to a mental examination"); MONT. CODE ANN. § 46-14-103 (2005) (noting that mental incapacity prevents a defendant from being "tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures"); NEB. REV. STAT. ANN. § 29-1823 (LexisNexis 2006) (stating that "any time prior to trial" anyone may raise a question regarding the defendant's mental incompetence); NEV. REV. STAT. ANN. § 178.400 (LexisNexis 2006) ("Any time before trial, or [judgment], if doubt arises as to the competence of the defendant, the court shall suspend the trial or the pronouncing of the judgment."); N.Y. CRIM. PRO. LAW § 730.20 (McKinney 2006) (stating that "any time after a defendant is arraigned . . . and before the imposition of sentence" the court may raise the issue of incompetency); PA. STAT. ANN. § 50-7402 (West 2007) (stating that a defendant may be deemed "incompetent to be tried, convicted or sentenced so long as such incapacity continues"); VA. CODE. ANN. § 19.2-169.1 (West 2007) (asserting that the competence issue may be raised "before the end of the trial"); VT. STAT. ANN. tit. 13, § 4817 (2005) ("A person shall not be tried for a criminal offense if he is incompetent to stand trial."); WYO. STAT. ANN. § 7-11-302 (2007) (declaring that no person who is incompetent "shall be tried, sentenced or punished for the commission of an offense").

83. *See, e.g.*, FLA. STAT. ANN. § 922.07 (West 2007) (requiring the governor to stay an incompetent person's execution if the person appears to be insane); GA. CODE ANN. § 17-10-61 (West 2007) ("A person under sentence of death shall not be executed when . . . the person is mentally incompetent."); IND. CODE ANN. § 35-36-9-6 (West 2007) (providing that the state must dismiss a mentally retarded person's death sentence); N.C. GEN. STAT. ANN. § 15A-2005 (West 2007) ("If the court determines the defendant to be mentally retarded, the court shall declare the case noncapital, and the State may not seek the death penalty against the defendant."); NEB. REV. STAT. § 29-1822 (2007) (stating that Nebraska cannot execute a mentally incompetent person until the person recovers from their incompetency); TENN. CODE ANN. § 39-13-203 (West 2007) ("[N]o defendant with mental retardation at the time of committing first degree murder shall be sentenced to death."); TEX. CODE CRIM. PRO. ANN. art. 46.05(a) (Vernon 2007) ("A person who is incompetent to be executed may not be executed."); WASH. REV. CODE ANN. § 10.95.030 (West 2007) ("In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed.").

Prior to *Atkins*, some states had already enacted statutes prohibiting the execution of the mentally retarded. *See* James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues* 4 (2002), *available at* http://www.aamr.org/Reading_Room/pdf/state_legislatures_guide.pdf ("All states that have capital punishment should pass legislation that protects people with mental retardation from the death penalty.").

appeals. However, as compared to the 100 pages of material dedicated to the issue of competence at the trial level, the issue of competence on the non-capital appeal level is addressed in less than four pages of text.[84] The black-letter rule at Standard 7-5.4 indicates that:

> A defendant is incompetent at the time of appeal in a non-capital case if the defendant does not have sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding, or if the defendant does not have a rational as well as factual understanding appropriate to the nature of the proceedings.[85]

This is, essentially, the *Dusky* standard.[86]

ABA Standard 7-5.4 goes on to state, however, that even if an attorney has doubts as to a non-capital defendant's competence during an appeal, "counsel for the defendant should proceed to prosecute [it] . . . despite the defendant's incompetence and should raise . . . all issues deemed by counsel to be appropriate."[87] This is because, the ABA's commentary asserts, "[c]onvicted defendants do not participate directly in appellate proceedings [as] review is based exclusively on trial records and appellate courts do not redetermine fact issues."[88] The commentary also points out that "counsel are not bound by the Constitution to follow their clients' demands" regarding what issues should be included in the brief.[89] Moreover, and perhaps most significantly, the ABA further claims that "*concerns about mental competence to undergo trial . . . have no close counterpart as far as appellate proceedings are concerned.*"[90]

The only action the ABA says should be taken by a lawyer with some doubt as to his client's capacity is to "make such doubt known to the court and

---

84. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, 7-5.4.

85. *Id.*

86. *Compare id.* (stating that the test for incompetency during appeal of a non-capital case is whether "the defendant does not have the sufficient present ability to consult with" his lawyer and whether "the defendant does not have a rational as well as factual understanding appropriate" to the proceedings), *with* Dusky v. United States, 362 U.S. 402, 402 (1960) (stating that the test for competency is whether the defendant has the "sufficient present ability to consult with his lawyer . . . and whether he has a rational as well as factual understanding of the proceedings").

87. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, 7-5.4(b)(ii).

88. *Id.* 7-5.4 cmt.

89. *Id.*; *see* Jones v. Barnes, 463 U.S. 745, 751 (1983) (stating that the Court has never found "that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points").

90. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, 7-5.4(b)(I) cmt. (emphasis added).

include it in the record."[91] This is not, however, for the purpose of procuring an evaluation or allowing the appellate court to take action to protect the defendant's rights. Rather, the ABA Standard indicates that it "does not go into . . . procedures to advance questions about appellants' present mental capacity . . . because [it does not see] orders for evaluation, evaluation reports, evaluation hearings, and dispositional orders *as a responsibility of appellate courts*."[92] The Standard and its commentary instead state conclusorily that "spread[ing] on the record" questions of capacity will allow the defendant in a later proceeding—such as a federal habeas corpus petition—to raise issues that may not have been raised because of incompetency.[93]

Interestingly, there is no counterpart to ABA Criminal Justice Mental Health Standard 7-5.4 for death penalty appeals. The ABA Standards offer no specific guidance for courts or counsel dealing with impaired capital defendants during the direct appeals. Rather, an addendum to Part V of the Standards entitled "Competence and Capital Punishment" merely addresses the question of whether death row inmates who suffer from mental impairment may have their sentences carried out.[94]

The addition of this part in 1987,[95] following the Supreme Court's decision in *Ford v. Wainwright*,[96] reflected the ABA's concern with the possible development by individual states of problematic procedures to ascertain whether a defendant was incompetent for purposes of the death penalty.[97] The ABA took a proactive role following *Ford*, offering specific

---

91. *Id.* 7-5.4(b)(I).

92. *Id.* 7-5.4 cmt. (emphasis added).

93. *Id.*

94. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, 7-5.5 (explaining that "standards 7-5.6 and 7-5.7 establish no policy on the death penalty itself," and emphasizing that "[t]heir sole purpose is to address complex issues dealing with post-conviction determinations of mental competence in capital cases"); *id.* 7-5.6 (stating that the mentally incompetent should be granted a stay of execution); *id.* 7-5.7 (offering standards to evaluate a convict's competency to be executed); *see also supra* Part III.A (discussing the lack of competency procedures for criminal defendants with pending appeals).

95. *See* ABA CRIMINAL JUSTICE HEALTH STANDARDS, *supra* note 19, at xv (noting that most of the Mental Health Standards were first published in 1986 and that new standards relating to competence and capital punishment were added in 1987); *see also supra* Part II.C (discussing the evolution of the ABA's standards and procedures for defendants with lower mental capacities).

96. *See* Ford v. Wainwright, 477 U.S. 399, 416 (1986) (concluding that states are constitutionally barred from executing the mentally insane, but failing to specify procedures states must provide for determining competency for execution that would satisfy the Eighth Amendment and due process concerns).

97. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, pt. V, introductory cmt. at 287–88 (noting the wide latitude to develop competency procedures *Ford*

recommendations for legislation and detailing steps that should be taken by state courts to evaluate sentenced death-row inmates who were believed to be incompetent.[98] It further outlined procedures for hearings to consider the results of such evaluation, including allocation of the burdens of proof, issuance of stays of execution for inmates found to lack competence, and reconsideration of such stays if competence is restored.[99]

The ABA acknowledged that the proposed rules might be "more painstaking than what appears to be the constitutionally accepted minimum under *Ford*," but stressed that with more than 1,700 prisoners on death row, the development of fair procedures surrounding administration of the death penalty was extremely important.[100] The recommendations represented "an attempt to balance the interests of both the convict and society in preventing the execution of any individual who is currently incompetent, with the interest of the criminal justice system in expeditious resolution of disputes about the convict's current mental condition."[101] But, such concerns did not extend to offering guidance for representing the same impaired capital defendants during the direct appeal process, which generally takes place years before an impending execution.[102]

D. The Appellate Setting: Incapacity Obscured

Despite the ABA's limited guidance and standards for dealing with the issue of defendant incompetence during appellate proceedings, it is clear that each year in this country defense lawyers represent a great many seriously mentally ill defendants on appeal. The pervasive and well-documented mental health problems of our nation's inmates—including the Supreme Court's recognition that defendants often decompensate mentally while incarcerated[103]—provide compelling proof that many persons with criminal

---

gave to the states, and explaining that the ABA's procedures often require more process than *Ford* designated as constitutionally mandated).

98. *See id.* 7-5.5, 7-5.6, 7-5.7 (offering competency evaluation guidelines and positing a stay of execution as the proper remedy for mentally incompetent prisoners who have been sentenced to death).

99. *See id.* (outlining the procedures to determine incompetence and the evidentiary standards the court should employ in its competency determination).

100. *Id.* pt. V, introductory cmt. at 287.

101. *Id.* at 288.

102. *See, e.g.*, Panetti v. Quarterman, 127 S. Ct. 2842, 2853 (2007) (explaining that petitioner's claim of incompetence for execution purposes was not considered ripe until nearly a decade after his direct appeals).

103. *See id.* at 2845 (stating that "[a]ll prisoners are at risk of" mental deteriorations).

cases pending before our nation's appellate courts may be seriously impaired. For some of these defendants the issue of competence was raised during trial-level proceedings. For others, it may not have been, either because the issue was not properly identified by defense counsel or others at trial, or because the defendant was not seriously impaired until after conviction. Regardless, the appellate lawyer is often asked to provide representation to a client whose mental capacity may be in issue.

Unfortunately, common appellate court practices work to obscure the extent of this problem. For example, many trial attorneys automatically file notices of appeal without conferring with their clients in order to preserve the client's right of review. But, this is a stage of the criminal process where a defendant should be meaningfully engaged as the defendant has the final say, constitutionally, whether to seek any appellate review.[104] It is at this time that defense attorneys are supposed to explain the pros and cons of challenging the conviction. Moreover, in some instances these same lawyers failed to seek competency evaluations of their clients during trial. Thereafter, the case moves into the appellate court setting, where it could be months before appellate counsel begins to look at the case or communicate with the client.

In addition, unlike trial court processes, appellate courts and their procedures are not designed to engage individual litigants—particularly criminal defendants.[105] Incarcerated defendants generally are not seen by appellate judges, do not attend court proceedings, and are never addressed directly by the court.[106] Not only are criminal appellants seldom observed by the very court deciding their cases, a good many never get to meet the lawyers

---

104. Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Dignity*, 93 KY. L.J. 39, 70 (2004) (describing whether to pursue an appeal as one of the fundamental decisions constitutionally allocated to the criminal defendant over the lawyer).

105. *See* Timothy H. Everett, *On the Value of Prison Visits with Incarcerated Clients Represented on Appeal by a Law School Criminal Defense Clinic*, 75 MISS. L.J. 845, 846 (2006) ("The constitutional message is clear: individuals convicted of crimes do not steer the course of their cases on appeal."); *see also* Cait Clarke & James Neuhard, *"From Day One": Who's in Control As Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 12 (2004) (noting the obsession in legal and popular culture with trial over all other parts of the criminal process).

106. *See* Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499, 503 (2000) ("Appellate courts can . . . be more effective by being good listeners . . . . [T]here are . . . ways to let individuals know that they have been heard, and let individuals know that their arguments have been fairly and fully considered."); David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743, 767 (2005) (discussing Ronner & Winick's suggestion that, in issuing per curium summary opinions, "courts accord appellants a sense of 'voice' by preparing very brief opinions that will at least indicate that the briefs have been read and understood").

who are supposed to be representing them before such courts.[107] Some of the least literate individuals in our country[108] are forced to communicate with their attorneys through written correspondence.[109] Even telephone calls to counsel, which often must be made collect to court appointed-counsel, may be a rarity.[110] Therefore, given their limited interactions with people outside of prisons, many more appellate defendants than currently realized may be seriously mentally impaired. The issue of appellant incapacity is rendered invisible by current appellate norms and processes.

E. Perpetuation of the Problem by Lower Courts

In light of this backdrop, it is not surprising that not a single reported decision to date has found a defendant incompetent to participate in appellate-level court proceedings. Rather, there exists a strong history of appellate courts denying defendants the right to assert incapacity for purposes of appeal. Frequently invoking the ABA's limited Criminal Justice Standards for appellate-level competence, most courts have found no right to be competent for defendants during direct appeals, much less provided for processes or remedies that follow in the wake of a valid claim of trial-level incapacity.[111]

---

107. *See* Everett, *supra* note 105, at 867–68 ("Though it may well be possible to provide 'effective assistance of counsel' to an appellate criminal client without visiting the prison house, that does not make it ethical."); Wexler, *supra* note 106, at 766 n.92 (recommending a greater level of communication than presently takes place between most appellate attorneys and their clients).

108. *See* MELINDA KITCHELL, DEP'T OF EDUC., PRISONERS LESS EDUCATED, LESS LITERATE, STUDY FINDS (1994), *available at* http://www.ed.gov/PressReleases/12-1994/pris.html (reporting a study showing that "prisoners have lower literacy rates than the overall population"); J.M. Linacre, *The Prison Literacy Problem*, 10 RASCH MEASUREMENT TRANSACTIONS 473, 473 (1996) (reporting that two-thirds of inmates do not have "the literacy skills needed to function in society").

109. *See* Everett, *supra* note 105, at 847 (stating that "exclusive reliance on written correspondence with an inmate client is problematic" because "[m]any individuals in a prison population cannot comfortably and effectively express themselves in writing").

110. *See* Letter from Denise A. Cardman, Am. Bar Ass'n, to Marlene H. Dorch, Fed. Commc'n Comm'n 3–4 (May 1, 2007) http://www.abanet.org/poladv/letters/crimlaw/2007may01_fccphone_l.pdf (noting that most inmates are only permitted to call their attorneys collect, which limits access to representation for indigent defendants relying on court-appointed counsel that are subject to public funding limitations).

111. *See* State v. White, 815 P.2d 869, 878 (Ariz. 1991) (holding that a criminal appeal may proceed even if a defendant has become incompetent and citing the ABA Criminal Justice Standards); People v. Kelly, 822 P.2d 385, 413–14 (Cal. 1992) (same); *see also* Dugar v. Whitley, 615 So. 2d 1334, 1335 (La. 1993) ("Counsel may proceed with an appeal on petitioner's behalf despite the district court's finding of incompetence."); People v. Newton, 394 N.W.2d 463, 466 (Mich. Ct. App. 1986) (holding that a criminal appeal may proceed even if a

For instance, over two decades ago in *People v. Newton*,[112] the Michigan Court of Appeals described appellant's claim that he was incompetent to assist with his pending appeal as a "novel issue supported by neither statute nor case law," and conclusorily stated "it would be unwise to require that defendants on appeal be competent to assist counsel in preparing their appeal."[113] Thus, the defendant's request for a forensic exam and stay of the appellate-level proceedings for regaining capacity was denied.[114]

Five years later, in *State v. White*,[115] the Arizona Supreme Court held that a mentally impaired capital defendant was not entitled to a competency evaluation during appeal or a stay of the proceedings to permit competence to be attained.[116] Referring to ABA Criminal Justice Mental Health Standard 7-5.4 for non-capital appeals, the court found it was not a denial of due process of law to require a mentally incompetent death row inmate to proceed with a direct appeal.[117]

Also relying largely on the ABA Criminal Justice Mental Health Standards for non-capital appeals, the Oklahoma Court of Criminal Appeals found in *Fisher v. State*[118] that a death-sentenced inmate did not need to be competent during the direct appeals process.[119] It held that the "existence of a

---

defendant has become incompetent), *vacated on other grounds*, 399 N.W.2d 28 (Mich. 1987); Fisher v. State, 845 P.2d 1272, 1276–77 (Okla. Crim. App. 1992) (holding that a criminal appeal may proceed even if a defendant has become incompetent and relying heavily on the ABA Criminal Justice Standards). *But see* Commonwealth v. Silo, 364 A.2d 893, 895 (Pa. 1976) (stating that "it would be improper for us to proceed with the instant appeal if in fact appellant was not competent to consult with counsel in its preparation," but requesting supplemental briefing regarding defendant's possible incapacity without taking further action on the issue). *Cf.* State *ex rel.* Matalik v. Schubert, 204 N.W.2d 13, 16 (Wisc. 1973) ("Presently . . . all states permit the suspension of criminal proceedings against an incompetent accused—usually at the trial stage, but also the sentencing, execution and appeal stages of the criminal process.").

112. *See* People v. Newton, 394 N.W.2d 463, 466 (Mich. Ct. App. 1986) (holding that a criminal appeal may proceed even if a defendant has become incompetent), *vacated on other grounds*, 399 N.W.3d 28 (Mich. 1987).

113. *Id.*

114. *Id.*

115. *See* State v. White, 815 P.2d 869, 878 (Ariz. 1991) (holding that a criminal appeal may proceed even if a defendant has become incompetent and citing the ABA Criminal Justice Standards).

116. *Id.*

117. *Id.*

118. *See* Fisher v. State, 845 P.2d 1272, 1276–77 (Okla. Crim. App. 1992) (holding that a criminal appeal may proceed even if a defendant has become incompetent and relying heavily on the ABA Criminal Justice Standards).

119. *Id.* at 1277.

doubt as to an appellant's present mental competency should not serve as a basis to halt state appellate proceedings."[120] Referring to the ABA Standards for non-capital appeals, the majority opined that once appellant had attained competence, he could try to have any issues he failed to raise on direct appeal reviewed by way of a post-conviction collateral challenge.[121] In doing so, the appeals court also refused to evaluate appellant's present competence, yet noted that the burden would be on the appellant to make a "threshold showing relating to mental incompetence" before being able to later claim he had been incompetent during his appeal.[122]

Similarly, in 1992, the Supreme Court of California held in *People v. Kelly*[123] that even if a death row inmate had become incompetent following trial, his direct appeal could proceed if he was represented by "able counsel."[124] The court noted that while "a defendant has a constitutional right not to be tried while incompetent . . . no case has extended this right to the appeal."[125] Moreover, "the considerations that prohibit an incompetent from being tried do not apply after the judgment."[126] Citing to the ABA Criminal Justice Mental Health Standards for non-capital appeals, the court indicated that appellant could raise additional claims in later proceedings if they could not be raised presently due to incompetence.[127]

Somewhat ironically, the *Kelly* court acknowledged that while appellant's impairment was a non-issue for appellate purposes, such impairment could pose a problem during a subsequent post-conviction review.[128] That is, while the defendant could be forced to pursue action in the appellate court while seriously mentally impaired, a later post-conviction court might find that his disability precluded his ability to meaningfully challenge the conviction.[129]

---

120. *Id.*

121. *See id.* (relying on ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, 7-5.4 & cmt.).

122. *Id.* Notably, one justice, the opinion author, would have remanded the case for an evidentiary hearing to determine immediately if it seemed some claim could not be raised due to the defendant's present incompetence. *Id.* at 1277 n.4.

123. *See* People v. Kelly, 822 P.2d 385, 413–14 (Cal. 1992) (holding that a criminal appeal may proceed even if a defendant has become incompetent and citing the ABA Criminal Justice Standards).

124. *Id.* at 414.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

In fact, several death penalty cases have found that a defendant's right to competence applies to post-conviction litigation—civil collateral challenges to convictions which ordinarily follow direct appeals.[130] Perhaps the leading case in this line is *Rohan ex rel. Gates v. Woodford*,[131] which aptly described the issue presented in a federal habeas proceeding as one "that falls somewhere between these two lines of authority: not competence to stand trial or competence to be executed, but competence to pursue collateral review of a state conviction in federal court."[132] Writing for the court, Judge Kozinski found federal habeas corpus provisions impliedly provide a right to be competent during such proceedings.[133] That is, because death row prisoners challenging state convictions in federal court have a right to appointed counsel,[134] they must be

130. *See* Rohan *ex rel.* Gates v. Woodford, 334 F.3d 803, 813 (9th Cir. 2003) ("[I]f meaningful assistance of counsel is essential to the fair administration of the death penalty and capacity for rational communication is essential to the meaningful assistance of counsel, it follows that Congress's mandate cannot be faithfully enforced unless courts ensure that a petitioner is competent."); Peede v. State, 955 So. 2d 480, 489 (Fla. 2007) (applying the *Dusky* standard to determine competence during post-conviction proceedings); Carter v. State, 706 So. 2d 873, 875 (Fla. 1997) ("[A] judicial determination of competency is required when there are reasonable grounds to believe that a capital defendant is incompetent to proceed in postconviction proceedings in which factual matters are at issue, the development or resolution of which require the defendant's input."); People v. Owens, 564 N.E.2d 1184, 1188–89 (Ill. 1990) (holding that the defendant must show a greater degree of incompetence for post-conviction proceedings); *see also* Martiniano *ex rel.* Reid v. Bell, 454 F.3d 616, 616–17 (6th Cir. 2006) (upholding the district court's stay of execution for purposes of a hearing on the question of petitioner's competence to participate in post-conviction litigation); Council v. Catoe, 597 S.E.2d 782, 787 (S.C. 2004) (adopting, in a case of first impression in South Carolina, a "default rule" that post-conviction review matters "must proceed even though a petitioner is incompetent" but that a court may stay review of fact-based challenges until the petitioner regains competency); People v. Simpson, 792 N.E.2d 265, 277 (Ill. 2001) ("If a defendant is competent to communicate allegations of constitutional violations to counsel, that defendant is competent to participate in post-conviction proceedings."). *But see* Commonwealth v. Haag, 809 A.2d 271, 278–81 (Pa. 2002) (holding, in a matter of first impression in Pennsylvania, that post-conviction proceedings in death penalty case should proceed despite petitioner's incompetence given appointment of "next friend"); *Ex parte* Mines, 26 S.W.3d 910, 915 (Tex. 2000) (refusing to imply a requirement that individuals be mentally competent for habeas proceedings in the same way defendants are competent for trial given the absence of legislation, "the statutory context, and the differences in the nature of the rights and procedures at trial and in post-conviction proceedings").

131. *See* Rohan *ex rel.* Gates v. Woodford, 334 F.3d 803, 813 (9th Cir. 2003) (finding an implied right to be competent during federal habeas corpus proceedings).

132. *Id.* at 810.

133. *Id.* at 817.

134. *See id.* at 813 ("In capital cases, prisoners challenging their convictions or sentences in federal court have a right to assistance of counsel."); *see also* 21 U.S.C. § 848(q)(4)(B) (2000) (providing that death row prisoners are entitled to assistance of counsel when challenging their convictions or sentences) (*repealed and replaced by* 18 U.S.C. § 3599).

able to effectively assist their counsel.[135] Otherwise, the statutory provision of an attorney would be meaningless.[136]

IV. Beginning of a Blueprint: Deconstructing Dusky *to Reconceptualize Competence Throughout the Criminal Process*

Urging a more nuanced approach to capacity in the criminal process, this Part challenges the criminal justice system's current attitude towards defendants who may be suffering from mental impairment during their direct appeals. Critiquing the lower court trend ignoring the mental status of appellants, this Part discusses an important counter-trend that recognizes the significance of defendant capacity during appellate proceedings. It goes on to suggest that the Supreme Court's recent decision in *Indiana v. Edwards*[137] may point the way to a more appropriate approach to competence considerations throughout all stages of criminal proceedings.

Building on these developments, it urges a fundamental reconceptualization of the idea of competence for criminal processes. Redrafting the ABA's Criminal Justice Mental Health Guidelines would go a long way in assisting this movement. These important Guidelines should be revised in their entirety to take account of more than legal rules, but also the views of mental health experts on the idea of competence who have called for the reconceptualization of trial-level competence concepts.[138] In doing so, they

---

135. *See Rohan ex rel. Gates*, 334 F.3d at 813 (explaining that the Supreme Court often bases the "competence-to-stand-trial requirement in the Sixth Amendment right to counsel"). Note, however, that while such defendants have a protected right to effectively assist counsel, they do not have a constitutional right to effective assistance of counsel in such proceedings. *See* Coleman v. Thompson, 501 U.S. 722, 752 (1991) (finding no constitutional right to an attorney in state post-conviction proceedings); Pennsylvania v. Finley, 481 U.S. 551, 558 (1987) (same); *see also* Murray v. Giarratano, 492 U.S. 1, 3–4 (1989) (finding no constitutional right to an attorney in state post-conviction capital proceedings).

136. *See Rohan ex rel. Gates*, 334 F.3d at 813 ("'Unless a death-row inmate is able to assist counsel by relaying [pertinent] information, the right to collateral counsel . . . would be practically meaningless.'" (quoting People v. Owens, 564 N.E.2d 1184, 1189–90 (Ill. 1990))). Without deciding the issue, the court also suggested that due process of law would preclude a statutory system of collateral attack that required petitioners to access the system while incompetent. *Id.*

137. *See* Indiana v. Edwards, 128 S. Ct. 2379, 2385 (2008) (finding that "the Constitution permits a State to limit a defendant's self-representation right by insisting upon representation at trial by counsel—on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented").

138. *See, e.g.*, Steven K. Hoge et al., *The MacArthur Adjudicative Competence Study: Development and Validation of a Research Instrument*, 21 LAW & HUM. BEHAV. 141, 147 (1997) (describing the benefits associated with a reconceptualization of adjudicative

can guide the bench and bar to ensure a more comprehensive, contextualized, and client-centered approach to defendant incapacity throughout all stages of a criminal case—including direct appeals.

A. Trouble with the Lower Court Trend

Beyond the obvious problem of repeatedly applying an ABA standard intended for non-capital cases to death penalty matters, the *Newton* line of cases and its absolutist approach to incompetence during appeals fails to account for the significance and realities of such litigation. As the ABA Standards note, appeals are different from trials in that the former generally deal with correction of errors and resolution of legal issues based on the record below.[139] And perhaps more fundamentally, although the accused enjoys a constitutional right to trial, he does not have the constitutional right to appeal his conviction.[140] Rather, individual states have chosen to confer that right upon convicted defendants.[141]

---

competence).

139. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, 7-5.4 (defining "mental incompetence at time of noncapital appeal" and stating that "[m]ental incompetence of the defendant at time of appeal from conviction in a criminal case should not prohibit the continuation of such appeal as to matters deemed by counsel or by the court to be appropriate"); AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE 21-1.2(a)(i-iii) (2d ed. 1980) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE] ("The purposes of the first level of appeal in criminal cases are: (i) to protect defendants against prejudicial legal error in the proceedings leading to conviction and against verdicts unsupported by sufficient evidence; (ii) authoritatively to develop and refine the substantive and procedural doctrines of criminal law; and (iii) to foster and maintain uniform, consistent standards and practices in criminal process.").

140. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983) ("There is, of course, no constitutional right to an appeal . . . ."); Ross v. Moffitt, 417 U.S. 600, 611 (1974) ("[W]hile no one would agree that a state may simply dispense with the trial stage of the proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all."); *see also* Cynthia Yee, *The Anders Brief and the Idaho Rule: It Is Time for Idaho to Reevaluate Criminal Appeals After Rejecting the Anders Procedure*, 39 IDAHO L. REV. 143, 145 (2002) (noting that while no constitutional right to appeal exists, "when states give criminals a statutory right to appeal their convictions, state appellate procedures must comply with the Fourteenth Amendment's guarantee of equal protection and due process of law . . . [and the] . . . Sixth Amendment right to counsel on their first appeal as of right").

141. *See Barnes*, 463 U.S. at 751 (discussing state's requirement to provide counsel for an indigent appellant on his first appeal as of right); *see also* Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence."); Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 44 n.185 (1995) (acknowledging that every state provides some right to appeal in criminal cases). *But see* Joseph Weisberger, *Appellate Courts: The Challenge of Inundation*, 31 AM. U.

But the Supreme Court has held that once a state does confer the right to appeal it must provide a system that is fundamentally fair and that provides for "adequate and effective" review of a defendant's claims.[142] Thus, to ensure equal protection of the law, indigent persons seeking to take a first, direct appeal in such states must be provided with a free and effective attorney.[143] Many of the same constitutional, right-to-counsel protections that are provided during trial, therefore, must also be provided to defendants on appeal.[144] It is from these same protections that the Supreme Court has largely derived the constitutional right to competence.[145]

Some defendants, however, are not represented on appeal.[146] Thus, a defendant's due process right to meaningful appellate proceedings cannot be rooted entirely in the right to counsel. For the appellate process to be fundamentally fair, a defendant must have the capacity to do what is necessary

---

L. REV. 237, 240 (1982) ("In some states that lack an intermediate court, review of all or certain classes of cases has been made discretionary. In Virginia and West Virginia, the supreme court has discretionary power to entertain or reject most appeals.").

142. *See Griffin*, 351 U.S. at 13, 20 (holding that a state may not, "consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment . . . deny adequate appellate review to the poor while granting such review to all others . . . . [It must] afford[] adequate and effective appellate review to indigent defendants"); *see also* Smith v. Robbins, 528 U.S. 259, 276 (2000) ("Our case law reveals that, as a practical matter, the [Equal Protection Clause and Due Process Clause] largely converge to require that a State's procedure 'affor[d] adequate and effective appellate review to indigent defendants.'") (citing Griffin v. Illinois, 351 U.S. 12, 20 (1956)); Shipman v. Gladden, 453 P.2d 921, 927 (Or. 1969) ("Since the state's criminal process would be found lacking in fundamental fairness if it permitted the deprivation of appellate review by the culpable neglect of counsel, the state must provide a remedy adequate to restore the impaired right.").

143. *See* Anders v. California, 386 U.S. 738, 744 (1967) ("The constitutional requirement of substantial equality and fair process can only be attained where counsel [on appeal] acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*."); Douglas v. California, 372 U.S. 353, 357–58 (1963) ("There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself."); *see also* People v. Stultz, 810 N.E.2d 883, 884 (N.Y. 2004) (recognizing a defendant's right to effective assistance of appellate counsel).

144. *See* Penson v. Ohio, 488 U.S. 75, 85 (1988) ("The need for forceful advocacy does not come to any abrupt halt as the legal proceeding moves from the trial to appellate stage.").

145. *See* Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (stating that competence to stand trial is a defendant's fundamental right and denying defendants this fundamental right violates due process). *Cf.* Indiana v. Edwards, 128 S. Ct. 2379, 2383–87 (2008) (noting that the constitutional requirement of competency at trial is based in part on a defendant's right to consult with counsel and assist in his own defense, yet concluding that a defendant may be competent enough to stand trial without being competent enough to represent himself at trial).

146. *See* Holmes v. Buss, 506 F.3d 576, 578 (7th Cir. 2007) ("[T]he presence or absence of counsel is [but] a detail.").

to avail himself of the appellate process.[147] Therefore, defendants should have a constitutional right to be competent during criminal appeals—a process used as a check on improprieties of the trial system including wrongful convictions, prosecutorial overreaching, and ineffectiveness of trial counsel. Indeed, appeals have long been viewed as an integral feature of our adversarial system of justice.[148]

Beyond this, the ABA Standards and the courts that have followed them are somewhat misguided in reasoning that the concerns underlying defendant competence at trial have "no close counterpart" on appeal.[149] As a case leaves the convicting court and moves to the appellate context, just like at trial, defendants may need to make important strategic decisions that affect the outcome of the case. They may also be called upon to provide information essential to their effective representation. Thus, clients of criminal defense lawyers, in many instances, do need to have at least some level of competence to have a meaningful appeal. Indeed, at least two different practice scenarios demonstrate this need—(1) risk assessments on the appellate level; and (2) reconstruction and other hearings ordered in connection with the appeal.

The ABA Standards are correct in observing that in most cases the attorney decides what issues to include in an appellate brief. As a constitutional matter, that is a decision—unlike the decision whether a defendant will testify at trial or whether to appeal in the first instance—that belongs to the lawyer.[150] As an ethical matter, however, frequently the defendant *will* need to make the final decision as to whether a certain issue

147. *See, e.g.*, *In re* Kevin S., 113 Cal. App. 4th 97, 102 (Ct. App. 2003) ("Regardless of the lack of absolute theoretical certitude of the Supreme Court's precise analysis, it is clear the due process and equal protection principles articulated the *Griffin* plurality and *Douglas* majority opinions require that as a practical matter a criminal defendant be provided with effective merits-related appellate review.").

148. *See* Drope v. Missouri, 420 U.S. 162, 171–72 (1975) (noting that the "prohibition [against trying incompetent defendants] is fundamental to an adversary system of justice"); Garen v. Kramer, No. CV 07-2401-R(E), 2008 WL 2704342, at *16 (C.D. Cal. July 10, 2008) ("[C]ompetency issues can implicate both procedural and substantive due process.").

149. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, 7-5.4 cmt. ("[C]oncerns about mental competency to undergo trial or to plead guilty or nolo contendre have no close counterpart as far as appellate proceedings.").

150. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983) ("Neither *Anders* nor any other decision of this Court suggests . . . that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points."); Anders v. California, 386 U.S. 738, 744 (1967) ("[The lawyer's] role as advocate requires that he support his client's appeal to the best of his ability."); *see also* Johnson, *supra* note 104, at 70 (describing whether to pursue an appeal as one of the fundamental decisions constitutionally allocated to the criminal defendant over the lawyer).

should be included.[151] This occurs when the issue to be raised may present some kind of "risk" to the client.[152] Such risk situations are often presented in plea cases—where a client pled guilty to a reduced charge for a reduced sentence.[153] The guilty plea or sentence might be challenged by appeal, but this will deprive the defendant of the plea deal and expose him to the possibility of a higher sentence. Moreover, such risks are not limited to the guilty plea context. In the case of a trial where the jury simply failed to resolve certain counts, seeking reversal of conviction on the lower-level counts might place the defendant in jeopardy of retrial on those higher-level counts—and, potentially, a higher sentence than presently being served.[154] Such risks are particularly acute when an avoided sentence of death is possible again after a successful

---

151. *See* Everett, *supra* note 105, at 847–48 ("A solid interpersonal line of communication with an appellate client is . . . a necessity so that counsel can determine with the client whether there are risks that should be defined and assessed in advance of trying to win the appeal."); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(B)(1) (1980) ("[A] lawyer may . . . exercise his professional judgment to waive or fail to assert a right or position of his client."); MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2005) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE DEFENSE FUNCTION STANDARDS 4-8.2 (1991) ("Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal.").

152. *See* United States v. Graves, 98 F.3d 258, 260 (7th Cir. 1996) (stating that "challenging a plea of guilty involves the additional consideration that if the challenge succeeds the defendant may well end up with a heavier sentence [than that provided by the original plea bargain];" therefore, the defendant must be made aware of this risk before an appeal is taken); *see also* Holmes v. Buss, 506 F.3d 576, 579 (7th Cir. 2007) (explaining that "the test [of competence to litigate or assist in litigation] is unitary but its application will depend on the circumstances," because the mental capacity necessary to decide whether to pursue an appeal with no potential downside is much less than that required under more complex scenarios).

153. *See* Julian A. Cook, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Defendants*, 75 U. COLO. L. REV. 863, 866 n.17 (2004) (noting the criminal justice system's "vast dependency" on guilty pleas; in 2000, 95% of federal defendants were convicted by way of plea); *see also* Clarke & Neuhard, *supra* note 105, at 15 ("[T]rials and courtroom battles, let alone not guilty verdicts, make up a very small percentage of the workload moving through American courts."); William J. Stuntz, Bordenkircher v. Hayes: *The Rise of Plea Bargaining and the Decline of the Rule of Law* (Harvard Public Law Working Paper No. 120, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=854284&rec=1&srcabs=880506 (describing *Bordenkircher* as "one of the great missed opportunities of American constitutional law" in that it failed to limit the potential for vindictive prosecution in the plea bargaining process).

154. *See, e.g.*, Chaffin v. Stynchcombe, 412 U.S. 17, 35 (1973) (holding that a higher sentence imposed by the jury after a successful appeal and second conviction by trial was not violative of the defendant's Due Process rights); North Carolina v. Pearce, 395 U.S. 711, 719–26 (1969) (finding "no absolute constitutional bar to the imposition of a more severe sentence upon retrial" and establishing a prophylactic test to guard against judicial vindictiveness towards defendants who succeed in appealing their initial convictions).

reversal. In both of these situations, ethically speaking, the client is the one who needs to decide whether he is willing to take the risk of challenging his conviction.[155] Thus a client must have some ability to understand the proceedings, comprehend his options, and make a reasoned choice.[156]

If a lawyer were to follow the suggestion of ABA Standard 7-5.4, there is a very real possibility that the lawyer could cause the client serious harm. Apparently, the ABA Standard would allow the attorney to raise any issue he might "deem appropriate," regardless of the risk.[157] Thus, the lawyer could pursue a plea withdrawal issue in order to win the appeal. But, as a result, the client might find himself in a worse situation without ever having decided to take the risk. On the other hand, the lawyer might assume the client does not wish to take the risk and as a result fail to pursue a valid claim. This situation raises constitutional as well as ethical concerns. Under the ABA's Guidelines approach, a defendant's fundamental right to decide whether to pursue or abandon the appeal is potentially abrogated.[158]

Similarly, although most appeals simply result in affirmance or reversal of a conviction, in a variety of instances an appeals court might hold a review in abeyance and return the matter to the trial court for further proceedings—usually a hearing of some sort.[159] When that occurs the defendant generally

---

155. *See Graves*, 98 F.3d at 260 ("[C]hallenging a plea of guilty involves the additional consideration that if the challenge succeeds the defendant may well end up with a heavier sentence . . . and this is a risk of which the defendant must be made aware before the appeal is taken."). Many thanks to Jerry Black for his important thoughts on such risk scenarios, particularly in death penalty cases.

156. *See id.* at 260–61 ("If there is reason to believe that [the defendant] was incompetent to assess the risk [presented by challenging a guilty plea], a determination of competence should be made before the appeal is allowed to proceed.").

157. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, 7-5.4(b)(ii) ("Counsel for the defendant should proceed to prosecute the appeal on behalf of the defendant despite the defendant's incompetence and should raise on such appeal all issues deemed by counsel to be appropriate.").

158. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983) (noting indigents have the right to an appeal if an appeal is available to defendants who can pay and "that the accused has the right to make certain fundamental decisions regarding the case, . . . [like whether to] take an appeal"); ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 139, 21-2.2 ("While [trial] counsel should do what is needed to inform and advise defendant, the decision whether to appeal, like the decision whether to plead guilty, must be the defendant's own choice."); *see also* Johnson, *supra* note 104, at 70 (describing the option of pursuing an appeal as one of the fundamental decisions constitutionally allocated to criminal defendants rather than their counsel).

159. *See, e.g.*, United States v. Thomas, 303 F.3d 138, 140 (2d Cir. 2002) (remanding for a supplemental record to be made and trial court to issue findings on a *Batson* challenge, but retaining jurisdiction over the appeal); United States v. Jacobson, 15 F.3d 19, 22 (2d Cir. 1994) ("Precedent thus allows us to seek supplementation of the record while retaining jurisdiction."); People v. Hussari, 774 N.Y.S.2d 725, 725 (App. Div. 2004) (holding appeal in abeyance for

has a right to participate in those further proceedings.[160] The defendant's input might be essential to the efficacy of the process—where, for instance, there is a need for the defendant's testimony. Proceeding without such input, as the ABA Guidelines suggest, could also work to harm the defendant's interests.

What is more, an unusual chasm now exists in criminal competence law. Although there is no constitutional right to counsel during post-conviction proceedings, which are generally viewed as civil in nature, a defendant with a statutory right to counsel in post-conviction litigation may have a greater right to be competent than a defendant who has a constitutional right to counsel during a direct appeal.[161] This anomaly is all the more confounding given that even the Supreme Court did not distinguish between competence for abandoning direct appeals as compared to collateral attacks in "death volunteer" cases.[162]

Although there is a statutory right to appointed counsel during federal habeas proceedings in death cases, there is no accompanying right to the effective assistance of counsel.[163] Thus, there is little quality control on the representation provided by such attorneys. What is more, some jurisdictions do not provide for appointment of counsel in state post-conviction review proceedings, even in capital cases.[164] Counting on post-conviction collateral

---

trial court to hold retrospective hearing as to defendant's competence at the time of trial).

160. For example, in one case in which this author was involved, the New York Appellate Division held an appeal in abeyance to permit the trial court to hold a hearing as to whether the defendant should have been permitted to withdraw his guilty plea—something the trial court failed to do in the first instance. To meaningfully prepare for that hearing, we met with our client and were provided with important details about what took place at the time of the initial guilty plea that likely we could not obtain elsewhere. Indeed, we were able to gather significant information, including names of additional witnesses who supported our client's claims. *See* People v. Earp, 775 N.Y.S.2d 598, 598 (App. Div. 2004) (holding appeal in abeyance for trial court to hold hearing on defendant's motion to withdraw guilty plea).

161. Interestingly, the right to competence has also been found implicit in a defendant's right to counsel in other parts of the criminal process. *See* Kostic v. Smedly, 522 P.2d 535, 538–39 (Alaska 1974) (adopting the *Dusky* standard for use in ascertaining "whether appellant, as a result of mental disease, lacks the ability to aid his counsel and comprehend the nature of the habeas corpus-extradition proceedings with a reasonable degree of rational understanding"); Pruett v. Barry, 696 P.2d 789, 792–94 (Colo. 1985) (rejecting "total inability to assist counsel" as the proper test for competency in extradition proceedings in favor of a standard which requires that the defendant have sufficient present ability to consult with his lawyer and a rational and factual understanding of the pending proceedings).

162. *See supra* note 66 and accompanying text (describing the court's failure to distinguish between abandoning direct appeals and collateral attacks in death volunteer cases).

163. *See supra* note 135 and accompanying text (discussing the differences between these two "rights").

164. *See, e.g.*, Sara Rimer, *Questions of Death Row Justice for Poor People in Alabama*, N.Y. TIMES, Mar. 1, 2000, at A1 (describing the effects of Alabama not having a state-wide

litigation, therefore, to be a stopgap measure ensuring that incompetent appellants will have their prior unraised claims identified and addressed seems folly,[165] particularly when they will need to retrospectively prove incompetence years after the appeal.[166] The cases of impaired defendants who prevail on an appellate claims resulting in a new trial present similar problems. The new trial attorney is left in the situation of trying to grapple with a defendant who did not consent to having the claim raised, due to incompetence, and determining what steps to take in the trial court to address the appellate lawyer's misstep.

Finally, and perhaps most fundamentally, the ABA's current suggestions for attorneys for handling appeals where a defendant may suffer from mental incapacity are out of touch with the concept of client-centered representation.[167]

---

public defender system); Equal Justice Initiative, the Crisis of Counsel in Alabama, http://www.eji.org/eji/files/crisisofcounsel.pdf (noting that in Alabama "inmates under sentence of death have no right to counsel"). My thanks to William Montross of the Southern Center for Human Rights for informing my thinking about this and the other points made in this section.

165. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 693 (2007) (noting that while defendants should wait to raise ineffective assistance of trial counsel claims until after direct appeal and during collateral review, there is no constitutional right to counsel during such proceedings). Primus goes on to note:

> If an indigent cannot raise ineffective assistance of counsel until collateral review and does not have the means to raise the claim effectively at that stage because the defendant has no counsel to conduct the necessary extra-record investigation, the right to effective trial counsel becomes a right without a remedy.

Id.; see also id. at 704 (arguing that the decision to locate certain challenges within the collateral proceeding context, rather than the direct appeal context, undermines the ability of appellate counsel to serve as a check on the fairness of the proceedings).

166. *See* Nancy J. King et al., *Habeas Litigation in the U.S. District Courts*, 4 (Aug. 21, 2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf (noting that federal habeas petitions in capital cases, on average, are filed 7.4 years following state judgment and non-capital cases are filed 6.3 years on average after state-court proceedings have ended).

167. I have previously described the development of the "client-centered" lawyering trend, led largely by practitioners, as compared to the somewhat related but distinct and more amorphous therapeutic jurisprudence movement. *See* Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539, 543–51, 591 (2007) (reviewing the development of "therapeutic jurisprudence" as advocated by professors Wexler and Winick, and concluding that "providing zealous and quality criminal defense" is preferable to this alternative approach to legal practice); Dennis Roderick & Susan T. Krumholz, *Much Ado About Nothing? A Critical Examination of Therapeutic Jurisprudence*, 1 S. NEW ENG. ROUNDTABLE SYMP. L.J. 201, 220 (2006) (noting therapeutic jurisprudence has many practical and conceptual problems and might serve the legal community better as philosophy); *see also* Cait Clarke & James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem-Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve*, 17 ST. THOMAS L. REV. 781, 781 (2005) (noting therapeutic jurisprudence "stems from the legal academy," while client-centered problem-solving lawyering "stems from practitioners").

There is some debate about what, exactly, is encompassed by the term client-centered lawyering. At its core, however, it is concerned with discerning and advancing the interests, objectives, and desires of the client.[168] The lawyer's role is shaped by, and does not eclipse, the client's role in the representation.[169]

The concept of client-centered lawyering was made popular nearly three decades ago by Professors David Binder and Susan Price. *See generally* DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977) (dissecting the complex nature of the client-attorney relationship and offering lawyers several techniques for achieving greater success in representing clients, specifically in litigation); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 369–70 (2006) ("As a theory of lawyering, client-centered representation has enjoyed unparalleled success [since being] [i]ntroduced by David Binder and Susan Price in 1977."). However, debate continues about exactly what kind of representation is encompassed by this term. For instance, Professor Kruse has noted that the client-centered approach to representation was initially intended to supplant "treat[ing] clients impersonally as bundles of legal issues . . . without exploring a client's actual values." *Id.* at 377–78. Rather, this approach has grown to encompass "problem-solving . . . holistic lawyering approaches that reach beyond the boundaries of the client's legal case to address a broader range of connected issues in the client's life." *Id.* at 371. Others who are considered more "traditional" advocates also describe themselves as client-centered in so far as "[t]he traditional model of devotion to a client's legal rights and interests is fundamentally client-centered, in the sense that it places fidelity to clients at the center of the lawyer's professional duties." *Id.* at 397; *see also* Abbe Smith, *The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. J.L. & POL'Y 83, 88 (2003) (discussing Monroe Freedman's belief that "the central concern of a system of lawyers' ethics is to strengthen and protect the role of the lawyer in enhancing individual dignity and autonomy through advocacy").

168. *See* Michael Pinard, *A Reentry Centered Vision of Criminal Justice*, 20 FED. SENT. R. 103, 104–05 (2007) (noting reentry into society for individuals with criminal records poses unique challenges and arguing defense attorneys should play a more holistic role in the assistance of criminal defendants); Quinn, *supra* note 167, at 540–42 (distinguishing the theory of therapeutic jurisprudence from "good old-fashioned 'zealous' and 'quality' criminal defense representation"); Kruse, *supra* note 167, at 372 (positing that the many differing interpretations of the term client-centered lawyering come together to "define a richly elaborated philosophy of lawyering that strives at once to be client-directed, holistic, respectful of client narrative, client-empowering, and partisan"); Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 123–24 (2004) (comparing the public defender's traditional, trial-centered approach to representation with a more progressive and holistic client-centered approach and suggesting the latter is preferable not only to individual defendants, but also for the community-at-large); *see also* Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibility Among Parents, Children and Lawyers in Delinquency Cases* 6 NEV. L.J. 836, 867–81 (2006) (arguing in support of the client-directed approach to child representation and offering several recommendations to lawyers as they decide "when and how parents should participate in the attorney-child consultation").

169. *See* MODEL RULES OF PROF'L CONDUCT Preamble (2002) (noting that a lawyer's responsibilities include serving as a legal advisor, legal advocate, negotiator, and evaluator for clients); MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. (2008) ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing

Examination of this kind of attorney-client relationship has occurred largely on the trial level, but its goals and application are equally relevant and important to appellate and post-conviction representation.[170] Suggesting that appellate attorneys should make assumptions about client goals and objectives may, in a given case, comport with minimum legal standards.[171] However, it may also perpetuate a hierarchical and paternalistic form of lawyering that many modern defense attorneys reject and believe to be professionally irresponsible.[172]

---

and able to do so.") The Model Rules offer an example: "[W]hen there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement." *Id.*; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 139, 4-1.1 cmt. (stating that the role of defense counsel is "complex, involving multiple obligations . . . [including] furthering the defendant's interest to the fullest extent of the law").

170. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 139, 21-3.2 (discussing the need for appellate counsel generally to respect the decisions of an appellant); Primus, *supra* note 165, at 722 ("[I]t is important to avoid overstating the distinction between trial and appellate attorneys, since there is substantial overlap in the skills required."); Peter B. Krupp & David Beneman, *Indigent Defense*, 27 THE CHAMPION 45, 45 (July 2003) (noting that quality of appellate representation receives little attention compared to trial representation); Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499, 502 (2000) ("Appellate lawyers can be more effective and can produce greater client satisfaction by making certain that they understand their clients' stories and what it is their clients wish to convey."); *see also* People v. Stultz, 810 N.E.2d 883, 888 (N.Y. 2004) (noting "it is inapt to have one standard for trials and another for appeals" when adjudging ineffective assistance of counsel claims).

171. My thanks to Keith Findlay, counsel for appellant Debra A.E., *infra* note 173, for sharing his insights on the importance of respecting client objectives. *See* Brief of Defendant-Appellant at 2–3, State v. Debra A.E., 523 N.W.2d 727 (Wis. 1994) (No. 92-2974-CR) (arguing "[t]he right to be competent to make decisions about what objectives to pursue . . . would seem to be [a] most basic, threshold due process right[]" and noting the importance of counsel's duty to safeguard such rights) (on file with the Washington and Lee Law Review); *see also* Jones v. Barnes, 463 U.S. 745, 759 (1983) (Brennan, J., dissenting) ("[T]he function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him to make choices that are his to make, not to make choices for him."); Cooper v. Oklahoma, 517 U.S. 348, 364 (1996) (noting there are "myriad smaller decisions" that a defendant can share in making).

172. *See* NLADA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.1 cmt. ("Actions or inactions that do not meet the test for ineffective assistance of counsel in a given case may still constitute poor representation."); Quinn, *supra* note 167, at 591 ("[M]uch of what the TJ movement suggests . . . parallels earlier paternalistic social reform efforts that were less than ideal and likely should not be repeated."); Everett, *supra* note 105, at 849 n.8 ("What often does not matter to lawyers is asking whether there is anything more that matters to the appellate client. There is more that matters to most clients. Many clients simply would like their attorneys not to look past them."); *see also* NLADA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 9.2 ("Counsel's advice to the defendant should include an explanation of the right to appeal the judgment of guilty and, in those jurisdictions where it is permitted, the right to appeal the sentence imposed by the court."); ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 139, 4-8.2 ("[Defense counsel] should give the

B. Emergence of a Counter-Trend: Grappling with the Grays

Fortunately, bucking this historic trend, several courts have departed from the absolutist position to analyze appellate-level incapacity in a way that more accurately reflects the complex realities of criminal practice. This body of law, consistent with the critique offered above and concerned with protecting the rights of the impaired, begins to offer a more nuanced approach to post-judgment competency law. Although this counter-movement offers important insights, some significant issues require further discussion and development.

In 1994, the Wisconsin Supreme Court looked at the consolidated post-judgment incompetence claims of two mentally impaired defendants in *State v. Debra A.E.*[173] Both defendants appealed trial court decisions denying competency evaluation requests that related to their ability to participate in lower court post-conviction relief proceedings.[174] Thus, the specific question to be addressed in *Debra A.E.* was the appropriate role of the *trial court* "when counsel requests a competency determination for a defendant during post-conviction relief proceedings."[175] Given Wisconsin's somewhat unique post-sentence processes, however, *Debra A.E.* necessarily implicated the issue of competence for purposes of appeal as well.[176]

---

defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal . . . [and] should also explain to the defendant the advantages and disadvantages of an appeal."); *id.* 21-2.2 ("Defense counsel should advise a defendant on the meaning of the court's judgment, of defendant's right to appeal, on the possible grounds for appeal, and of the probable outcome of appealing. Counsel should also advise of any posttrial proceedings that might be pursued before or concurrent with an appeal.").

173. *See* State v. Debra A.E., 523 N.W.2d 727, 738 (Wis. 1994) (reversing judgments from two circuit courts denying defendants' respective motions for evaluation of competency to participate in post-conviction relief process and remanding to circuit courts for competency hearings, noting "a circuit court should rule on defendants' competency when there is reason to doubt a defendant's competency").

174. *Id.* at 729.

175. *Id.* at 731.

176. Wisconsin's post-conviction relief procedures are distinct from post-conviction review proceedings, which generally would follow direct appeal. *Id.* at 729 n.2. A request for post-conviction relief, in Wisconsin, is usually required prior to challenging a conviction or sentence on direct appeal. *See id.* at 731 (outlining the kinds of post-conviction relief that may be sought under Wisconsin Code § 809.30 including mistrial based upon improper jury instructions, a denial of which can later be combined with other claims on direct appeal). Generally this request is made while the case is still under the control of the trial court, with a new attorney appointed for indigent defendants for purposes of the post-conviction relief and appellate proceedings. *See, e.g., id.* at 731 n.4 ("Both defendants completed SM-33 Information on Post-conviction Relief forms at the conclusion of their sentencing hearings.") (citations omitted).

The court acknowledged that in the course of Wisconsin's post-conviction relief proceedings a defendant likely will be called upon "to make the decision to proceed with or forego relief, . . . decide whether to file an appeal and what objectives to pursue" in that appeal.[177] She might also need to provide counsel with factual information relevant to the post-conviction relief proceedings as well as claims on direct appeal.[178] The court thus found that the defendant had a right to competence in post-conviction relief proceedings.[179]

In terms of the standard of competence to be applied, the court held that such defendants would need to be informed by the specific circumstances at hand and the tasks they might need to undertake.[180] "Based on the tasks that may be required of defendants seeking post-conviction relief, . . . a defendant is incompetent to pursue postconviction relief . . . when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding."[181] This standard appears to fall somewhere between the standards announced in *Dusky*[182] and *Rees*.[183]

Beyond announcing a contextualized competence standard based on where the defendant was in the proceedings, the *Debra A.E.* court outlined a process for evaluating post-judgment incompetence claims that in many ways mirrors the constitutionally mandated procedures developed in the trial context.[184] The court held that when a good faith doubt about a defendant's competence post-judgment is raised, either by the parties or the court, the defendant should be evaluated.[185] The court thereafter must hold a hearing or engage in some other meaningful method of determining whether the defendant is competent to

177. *Id.* at 732.

178. *Id.*

179. *See id.* at 734–35 (concluding that defendant's counsel, the state, or the court itself may move for a post-conviction evaluation of defendant's competency, though "[m]eaningful postconviction relief can be provided even though a defendant is incompetent").

180. *Id.* at 734 ("Competency is a contextualized concept; the meaning of competency in the context of the legal proceedings changes according to the purpose for which the competency determination is made. Whether a person is competent depends on the mental capacity that the task at issue requires.").

181. *Id.* (referring to post-conviction relief proceedings under Wisconsin Code § 809.30).

182. *See supra* Part II.A (discussing the *Dusky* two-part inquiry employed in determining defendants' competency and subsequent development in that standard).

183. *See supra* notes 62–66 and accompanying text (finding a potentially meaningful difference between the *Dusky* and *Rees* competency standards).

184. *See* State v. Debra A.E., 523 N.W.2d 727, 734–36 (Wis. 1994) (prescribing the process for management of post-conviction incompetency issues and the roles the court, counsel, and the defendant should play in resolving such issues).

185. *Id.* at 734–35.

proceed.[186] The court must contemporaneously rule on the question of defendant's competence, not only to determine what action should be taken at the time but also to "create[] a record of a defendant's mental capacity, thus eliminating the difficulty of attempting to measure that capacity months or years after the period in question."[187]

Under the *Debra A.E.* framework, if the court finds a defendant is incompetent for purposes of pursuing post-conviction relief, a variety of remedies are available depending upon the particular circumstances.[188] First, although defense counsel should move forward to the extent feasible with the post-conviction relief proceedings where no risk of harm to the defendant exists, where an accused's input or decision-making is necessary to the process the court may grant a defense continuance.[189] Alternatively, if it appears the defendant is unable to make necessary decisions on his own behalf, defense counsel may seek appointment of a guardian ad litem "to instruct defense counsel whether to initiate post-conviction relief and, if so, what objectives to seek."[190] Finally, after regaining competency, a defendant would be permitted to raise issues that were not raised earlier due to his incapacity.[191] Given that an actual determination as to competence would have been made previously, the defendant would be well-positioned to explain his reasons for failing to pursue the issues earlier.[192] Thus, unlike in the trial context with its one-size-fits-all approach under *Dusky* and its progeny, the *Debra A.E.* decision contemplates a more contextualized remedy structure for post-judgment incompetence inquiries.[193] With this framework outlined, the *Debra A.E.* case was remanded to the trial court for further proceedings not inconsistent with the decision.[194]

---

186. *See id.* ("[The court] shall . . . determine the method for evaluating a defendant's competency, considering the facts before it and the goals of the competency ruling.").

187. *Id* at 735.

188. *See* State v. Konaha, No. 02-2674-CR, 2003 WL 22594229, at *3 (Wis. Ct. App. Nov. 11, 2003) (reviewing procedures available to defendant, counsel, and court when doubt exists regarding a defendant's competency, and noting that "[t]he method of evaluation will vary depending on the facts of the case and location of the defendant").

189. *Debra A.E.*, 523 N.W.2d at 735–36.

190. *Id.* at 736.

191. *Id.*

192. *See id.* ("An issue not raised during postconviction relief because of a defendant's incompetency cannot be equated with an issue that could have been, but was not, litigated on direct appeal.").

193. *See id.* at 732, 734 ("Whether a person is competent depends on the mental capacity that the task at issue requires . . . . The method of evaluation will vary depending on the facts and whether the defendant is incarcerated.").

194. *Id.*

In 1996 the Seventh Circuit was faced more squarely with the question of whether a defendant had the capacity to pursue a direct appeal in *United States v. Graves*.[195] Dale Graves was a 61-year-old man with no prior criminal record who, after suffering a severe stroke that affected his speech and gait, robbed the same bank on three different dates without a disguise.[196] He pled guilty to all three charges and was sentenced to nearly ten years in prison.[197] His appointed lawyer filed only an *Anders*[198] brief on appeal.[199] The Court of Appeals directed the attorney to look into two potentially viable issues relating to certain representations made to Graves at the time of his plea.[200] These apparently incorrect statements undermined the knowing and voluntary nature of his plea.[201] After counsel filed the new brief addressing the misrepresentations, the court *sua sponte* raised the question of whether Graves was competent to move forward with his appeal.[202]

Writing for the court, Chief Judge Posner identified the perilous risk noted herein,[203] where an appellant who enters into a plea agreement and then appeals may face a stiffer sentence if he prevails.[204] Thus, the court *sua sponte* held "[i]f there is reason to believe that [the defendant] was incompetent to assess the risk, a determination of competence should be made before the appeal is allowed to proceed."[205]

The *Graves* court went on to question, however, whether Graves was competent to enter the plea in the first place.[206] In the end, the court avoided

---

195. *See* United States v. Graves, 98 F.3d 258, 262 (7th Cir. 1996) (holding a defendant who pled guilty to three counts of armed robbery was entitled to a competency hearing before he entered such a plea).

196. *Id.* at 258.

197. *Id.*

198. *See* Anders v. California, 386 U.S. 738, 744 (1967) (holding that appointed counsel may file with the court a brief stating there exist no nonfrivolous grounds for appeal and request a withdrawal from the case as attorney of record).

199. *Graves*, 98 F.3d at 258.

200. *See id.* at 259 (ordering counsel to research issues of a FED. R. CRIM. P. 11(c)(5) violation and judicial misrepresentation of "good time credits").

201. *Id.* at 260–62 (discussing the effect a misrepresented fact might have on the defendant's decision to enter a guilty plea and the role competency plays in evaluating such misrepresentation and its prejudicial effects).

202. *Id.* at 260 (acknowledging the presumption of competency but finding reasons to question the defendant's ability to understand the nature and object of his plea hearing).

203. *See supra* note 152 and accompanying text (discussing potential risks of higher sentencing following successful appeal and second conviction).

204. United States v. Graves, 98 F.3d 258, 260–61 (7th Cir. 1996).

205. *Id.*

206. *See id.* at 261 ("Graves's competence to decide to challenge his guilty plea by way of

answering several important questions, including whether Graves was competent for purposes of appeal, what standard of competence should apply at the appellate level, what procedures should be followed to determine competence on the appellate level, and what remedy would flow from an incompetence finding. Rather, the Seventh Circuit remanded the case for a determination of Graves's competency for purposes of pleading guilty in the first instance.[207] This, it suggested, would "most likely make the question of his competence to challenge his guilty plea on appeal moot."[208]

The Seventh Circuit did finally explore the issue of post-judgment competence eleven years later in *Holmes v. Buss*.[209] In that case, a mentally impaired death row inmate appealed the denial of federal habeas corpus relief.[210] The Court addressed as a matter of first impression the question of whether a defendant has a right to competence during district court habeas corpus proceedings and habeas appeals.[211] In holding that petitioner did have such a right, the Court adopted the rule set forth by the Ninth Circuit in *Rohan*.[212] *Buss* went further, however, by attempting to bring greater coherence to criminal mental health law by suggesting that defendants should have the right to competence throughout all stages of the criminal process—including trial, direct appeals, post-conviction review, and appeals from post-conviction proceedings.[213]

Concerned that the law of competence as it relates to various settings—for instance, competence for trial versus competence to be executed—had become overly complicated, the court announced a "unitary" rule for competence determinations:[214] "[W]hatever the nature of the proceeding, the test should be whether the defendant (petitioner, appellant, etc.) is competent to play whatever

---

appeal is placed in doubt by doubts about his competence to plead guilty in the first place.").

207. *See id.* at 262 (remanding the case for a hearing on defendant's competence to participate in plea proceedings).

208. *Id.*

209. *See* Holmes v. Buss, 506 F.3d 576, 578 (7th Cir. 2007) (concluding that a petitioner for habeas corpus in a capital case must be competent to assist his counsel).

210. *Id.* at 577.

211. *See id.* at 578 ("[W]e might doubt [on first impression] the legal significance of a person's lacking the mental competence to prosecute, or to assist his lawyer in prosecuting, a federal habeas corpus proceeding.").

212. *See id.* (declining to reject *Rohan* and create an intercircuit conflict).

213. *See id.* (declining to create a different standard for determining competence in post-conviction proceedings from that used in pre-conviction proceedings).

214. *See id.* at 579 ("The test is unitary but its application will depend on the circumstances. They include not only the litigant's particular mental condition, but also the nature of the decision that he must be competent to make.").

role in relation to his case is necessary to enable it to be adequately presented."[215] As an example, the court explained that if a defendant on appeal can raise claims that would result in "a heavier sentence than the one appealed from, the defendant will need a higher level of mental functioning to be able to make a rational decision of whether to pursue or forgo the appeal."[216] The Court of Appeals did not, however, outline specific procedures that should be followed when a claim of appellate incompetence is raised.[217] Nor did it suggest particular remedies if such a finding is to be made.

These cases begin to sketch a more coherent approach to competence across all criminal proceedings. This new approach recognizes that defendant capacity during direct appeals, as at other phases of the case, may be essential to the efficacy of the proceedings. The Supreme Court advanced this approach in *Indiana v. Edwards*.[218]

C. *Supreme Court Embraces Individualization:* Indiana v. Edwards

In *Indiana v. Edwards*, a state trial court found the defendant mentally competent to stand trial as defined by *Dusky*, but not mentally competent to conduct the trial himself.[219] Upholding the trial court's decision to prohibit the mentally impaired defendant from proceeding *pro se*, the Court recognized the limits of *Dusky* as a unitary competence standard.[220] Focusing on a defendant's ability to assist his attorney during trial, the Court noted that the *Dusky* standard lacks utility when a court is called upon to consider other kinds of defendant "mental-illness-related limitation(s)."[221] Connecting the medical and scientific issue of defendant impairment with the legal concept of competence in a way that *Dusky* failed to do, the Court explained "mental illness itself is not a unitary concept" but one that "varies in degree [and] can vary over time," "interfer[ing] with an individual's functioning at different times and in different

---

215. *Id.*

216. *Id.*

217. *See id.* at 583 (ordering that remand be "conducted with dispatch," but failing to outline specific procedures by which to conduct the competence inquiry).

218. *See* Indiana v. Edwards, 128 S. Ct. 2379, 2385 (2008) (holding that the Constitution allows a state to limit a defendant's self-representation right by insisting upon representation by counsel at trial when the defendant lacks mental capacity to conduct his trial defense without representation).

219. *Id.* at 2379.

220. *See id.* at 2386 (noting that *Dusky* focused on the defendant's "present ability to consult with his lawyer").

221. *Id.* at 2384.

ways."[222] The Court accordingly recognized the need for different measures of capacity depending on the situation presented.[223] In the end, it embraced a more nuanced approach to the concept of competence during the criminal process than the monolithic standard articulated in *Dusky*. Competence determinations, it held, may need to be "more fine-tuned" and "tailored to the individual circumstances of a particular defendant."[224]

D. A Call for More Comprehensive, Coherent, and Client-Centered Criminal Justice Mental Health Standards

In light of the foregoing, it is clear that the time has come to take the next step in the development of criminal mental health law: A fundamental reconceptualization of the concept of competence across all stages of the criminal process. The ABA Criminal Justice Mental Health Standards—now nearly two decades old—can serve as an important focus for this reform movement. As it did following the Supreme Court's decision in *Ford v. Wainwright*,[225] the ABA should seize upon this opportunity to take a proactive role in the wake of *Indiana v. Edwards* to offer specific recommendations for properly contextualizing the concept of competence throughout all phases of criminal cases.[226] Doing so, it can draw lessons from insights offered in *Debra A.E.*, *Graves*, and *Buss*.

This rewriting should not occur in piecemeal fashion, however, as with the recent important but narrowly-focused work of the ABA-IRR Task Force on Mental Disability and the Death Penalty.[227] Instead, it should take place with all facets of the criminal process in mind.[228] Consideration of appeals, which

---

222. *Id.* at 2386.

223. *See id.* at 2387 ("[G]iven the different capacities needed to proceed at trial without counsel, there is little reason to believe that *Dusky* alone is sufficient.").

224. *Id.*

225. *See* Ford v. Wainwright, 477 U.S. 399, 410 (1986) (holding that the Eighth Amendment prohibits states from inflicting the death penalty on prisoners who are insane).

226. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, pt. V, introductory cmt., at 287–88 (recognizing that the meaning of competence shifts depending on the procedural context within the course of a criminal case and is "broader than more general determinations of present mental competence to be tried").

227. *See generally supra* note 8 and accompanying text.

228. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 19, 7-5.5, 7-5.6, 7-5.7 (providing standards for post-conviction determination of mental competence in capital cases, stays of execution for currently incompetent condemned convicts, and evaluation and adjudication of competence to be executed).

have been largely ignored by the Guidelines, can serve as a linchpin unifying the concept of competence across the criminal process.

The new Guidelines should be rooted in science as well as in law. In this way, they can offer more coherent rules and procedures for dealing with competency questions across all stages of a criminal case, leading the way for legislatures, courts and practitioners. Obviously, a number of significant questions will need to be considered by drafters, including the appropriate standards, procedures and remedies in different kinds of competence cases. As a starting point, this section offers some thoughts for consideration relating to appeals.

1. Standards

An overarching framework like the one announced by *Buss*—"whether the defendant (petitioner, appellant, etc.) is competent to play whatever role in relation to his case is necessary to enable it to be adequately presented"[229]—offers a useful lens for considering the concept of competence in criminal cases. Framing the inquiry in this way allows the bench, bar, and others to become more rigorous in their thinking about the important role that defendants play throughout the criminal process. This would be a significant development in appellate litigation, where the voices and concerns of the accused historically have been ignored not only by appellate courts, but also by counsel.[230]

Buss's concern for the tasks that may face the defendant depending on where he is in the criminal process is also instructive.[231] It recognizes that different tasks during a prosecution may require of a defendant different levels of understanding, rationality, communication, and the like.[232] For instance, a

---

229. Holmes v. Buss, 506 F.3d 576, 579 (7th Cir. 2007).

230. *See* John Bray & Byrn Lichstein, *The Evolution Through Experience of Criminal Clinics: The Criminal Appeals Project at the University of Wisconsin Law School's Remington Center*, 75 MISS. L.J. 795, 815–16 (2006) (describing how the Remington Center uses a client-centered approach in criminal appeals cases, which is relatively unusual in appellate practice and above and beyond what is required to provided effective assistance of counsel under the Sixth Amendment); Everett, *supra* note 105, at 850 ("It is not difficult to see why appellate attorneys perceive little need for direct personal contact with appellate clients and why many prefer written contact with clients.").

231. *See Holmes*, 506 F.3d at 579–80 ("The test is unitary but its application will depend on the circumstances. They include not only the litigant's particular mental condition but also the nature of the decision that he must be competent to make.").

232. *See id.* (discussing, with examples, the tasks that face defendants in different procedural phases of the criminal process, some requiring higher degrees of defendant involvement than others); *see also supra* notes 214–16 and accompanying text (same).

defendant called upon to decide during an appeal whether to undertake a significant risk, as in *Graves*, likely requires a relatively high level of reasoning and comprehension—perhaps more so than during a trial.[233]

Adoption of a unitary and flexible competence rule is also attractive because it avoids a balkanized and confusing patchwork of standards. The variety of competency tests that have developed in a piecemeal fashion have already confounded courts and practitioners.[234] As the *Buss* court wisely noted, "[t]he multiplication of rules and standards, carrying in its train as it does endless debate over boundaries, is one of the banes of the American legal system, a source of appalling complexity."[235]

Despite these benefits, however, adopting *Buss*'s general rule as the single competence standard in criminal cases without further guidance or parameters presents significant problems. First, the amorphous *Buss* test leaves tremendous discretion with judges to measure competence as they see fit. This is particularly troubling given that judges generally do not have the scientific or medical expertise necessary to any meaningful measure of capacity. The comparative level of mental functioning required for a defendant to play this role versus another—or to make this decision versus another—is likely beyond the ken of members of the bench and bar. Indeed, the disparity among the various tests determining competence for execution demonstrates that the legal profession may be ill-suited to this task.[236]

---

233. *See id.* at 579 ("If instead, as is common, the issue for appeal is whether there was error at sentencing and if the appeal is successful the case will be remanded for resentencing and the judge may give the defendant a heavier sentence than the one appealed from, the defendant will need a higher level of mental functioning to be able to make a rational decision whether to pursue or forgo the appeal.").

234. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 410 (1986) (adopting the competence for execution test); Rees v. Petyon, 384 U.S. 312, 313 (1966) (adopting the competency to volunteer for death test); Dusky v. United States, 362 U.S. 402, 402–03 (1960) (adopting the competence for trial test); *see also* Indiana v. Edwards, 128 S. Ct. 2379, 2387–88 (2008) (emphasizing the need for flexibility in competency standards so trial judges can "make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant").

235. Holmes v. Buss, 506 F.3d 576, 579 (7th Cir. 2007). *Cf.* Torben Spaak, *Explicating the Concept of Legal Competence* (Sept. 17, 2007), http://ssrn.com/abstract=1014402 ("[I]t is rather unclear how legal practitioners conceive of the competence concept.").

236. *See supra* note 76 and accompanying text (observing "confusion and disparity" across jurisdictions of the way mental retardation claims are analyzed); Van Tran v. Tennessee, 128 S. Ct. 532, 532 (2007) (denying writ of certiorari on the petitioner's claim that Tennessee statutory law and procedure precluded proper finding of the petitioner's retardation under *Atkins*); AMERICAN BAR ASSOCIATION, REPORT OF THE TASK FORCE ON MENTAL DISABILITY AND THE DEATH PENALTY, 1 (2005), *available at* http://www.apa.org/releases/mentaldisability anddeathpenalty.pdf (calling for the adoption of the definition for retardation recommended by the American Association of Mental Retardation); Kate DeBose Tomassi, *The Fight to Define*

Beyond this, delving too deeply into the specific tasks that a defendant may be called upon by counsel to undertake in a particular case may present another set of problems. Disclosing the specifics of these communications runs the risk of breaching the confidentiality of the attorney-client relationship and permitting courts to involve themselves in defense strategy.[237] Thus, while it may be time to focus the competence lens on different junctures within the criminal process beyond trial, it likely should not be allowed to focus too closely on the particulars of the specific choices and decisions facing the defendant.

Therefore, in ascertaining the exact measure of competence necessary for the particular tasks, drafters would be well served to consider the various phases in a criminal case where a defendant is called upon to make decisions, assist, or otherwise play a role in the proceedings. From these snapshots—such as the situation in which a defendant with a favorable plea deal must decide whether to risk an appeal—a more specific competence standard for that phase of the process can be generated. Two, or three, or more specific standards might need to be outlined for different phases of the process. But the ABA's Guidelines can do a better of job of illuminating each test's particular context and function.

In addition, rather than developing abstract legal standards to drive the determination of experts, it might be time for lawyers to allow scientific expertise to begin to drive the creation of the legal standards. For instance, in the 21st century, *Dusky*'s common-sense but relatively naïve approach to mental capacity looks incredibly primitive, particularly for the very mental health experts who are called upon to use it as a measure in practice.[238] The same could be said for the standards set forth in *Rees*, as well as *Debra A.E.* The ABA should begin to hear from mental health experts about how they would go about measuring such capacities.[239] Thus, scientific literature could

---

Mental Retardation, THE AMERICAN LAWYER, Sept. 2005, at 128 ("Texas, like several other states, has been slow to define mental retardation for the purposes of capital trials."); Philipsborn, *supra* note 14, at 417 ("There are remarkable variations in the ways competence is assessed and adjudicated, even from between courts within a single state.").

237. I am most grateful to my colleague Jennifer Hendricks for raising this concern.

238. *See* Maroney, *supra* note 16, at 1379 ("[The *Dusky* standard is] highly unpredictable in application, in large part because the task of implementing [it] generally falls to forensic experts . . . . These experts . . . may differ wildly in approach, theoretical framework, understanding of the relevant legal constructs, and conclusions.").

239. *See id.* at 1380 (noting that forensic experts and legal theorists have worked together to promote some measure of uniformity, but that resulting tests are not yet widely used); Philipsborn, *supra* note 14, at 420 ("It is clear that both mental health experts and lawyers involved in capital litigation can participate in improving the quality of professional practice related to competence assessments and adjudications."); *see also* Perlin, *supra* note 81, at 25

suggest specific meaningful measures for courts to use when called upon to assess defendant capacity in a given situation.[240]

2. Procedures

The ABA should also revise the suggested procedures for addressing the question of competence when it is raised post-judgment. *Dusky* and its progeny provided a procedural framework for trial court practitioners and judges that included defendant evaluation, evidentiary hearing, and court ruling, which the ABA Standards presently mirror.[241] No similar process is outlined for appeals—non-capital or capital—or post-conviction proceedings. Unfortunately, *Debra A.E.*, *Graves*, and *Buss* fail to offer much meaningful guidance on this score. Both *Graves* and *Buss* simply resulted in remands, where trial courts were left to grapple with what procedures should be followed to ascertain whether the defendants in question lacked capacity.[242] *Debra A.E.* went further by outlining required procedural steps very much like those used in the trial competence setting—competency evaluation, evidentiary hearing, and court ruling.[243] But this was in the context, however, of Wisconsin's somewhat unusual post-judgment litigation structure, where defendants generally undertake post-conviction relief efforts in the trial court as a first step in the appeal process.[244]

Nevertheless, the *Debra A.E.* court aptly suggested these procedures should be followed whenever a good faith doubt about the defendant's competence is raised post-judgment—even if the case has already moved out of

---

(observing that the Supreme Court "is comfortable with (and responsive to) a greater role for mental health experts in judicial proceedings"); Hoge et al., *supra* note 138, at 145–47 (describing the flaws of the current legal standards and explaining the benefits of incorporating mental health expertise).

240. *See* Maroney, *supra* note 16, at 1380 ("Forensic experts and legal theorists have collaborated, particularly in very recent years, to formulate standardized mechanisms for defining and measuring competence-relevant facts, but these tests are not yet widely used, despite their promise of promoting some measure of uniformity."). *See generally* Hoge et al., *supra* note 138 (explaining the development of a criminal competence assessment instrument as a result of collaboration between forensic and legal experts).

241. *See supra* Part II (discussing *Dusky* and its progeny and the procedural framework established by those cases).

242. Holmes v. Buss, 506 F.3d 576, 579 (7th Cir. 2007); United States v. Graves, 98 F.3d 258, 262 (7th Cir. 1996).

243. State v. Debra A.E., 523 N.W.2d 727, 734–35 (Wis. 1994).

244. *See id.* at 729 (outlining Wisconsin's practice of undertaking post-conviction relief efforts in the trial court).

the trial court and into an appellate venue.[245] An immediate evaluation in the very court where the problem of possible incompetence arises serves multiple purposes.[246] Not only will an incompetence finding possibly trigger some action other than mere processing of the case, it allows for a contemporaneous determination that could be important in later litigation to show cause for the defendant's failure to pursue certain claims earlier.[247] Such a process seems far superior to the current ABA suggestion that counsel simply inform the appellate court of the possibility of client incompetence, leaving for another day—or possibly another year—evaluation of that claim.[248]

Admittedly, these procedures might seem unusual on appeal as reviewing courts are not set up to oversee mental health evaluations and conduct evidentiary hearings.[249] But in this era of rethinking the roles of courts through problem-solving functions and otherwise, it is not outside of the realm of possibility for appellate courts to order competency evaluations by experts and to review findings.[250] Adjunct appellate court staff, like referees or special masters, might be able to serve as the arbiters of such matters to prevent them from being remanded to lower courts for such assessments.[251] The delay and

245. *See id.* at 734 ("We conclude that after sentencing, if state or defense counsel has a good faith doubt about a defendant's competency to seek postconviction relief, counsel should advise the appropriate court of this doubt on the record and move for a ruling on competency.").

246. *Id.* at 735.

247. *Id.*

248. *See* King et al., *supra* note 166, at 30 (finding that claims regarding competency at trial added between 35% and 39% to the time to complete the case); Bonnie, *supra* note 8, at 1178 ("[C]ourts typically will not entertain claims of incompetence for execution until all avenues of collateral relief have been exhausted.").

249. *See, e.g.*, TEX. CODE CRIM. PRO. ANN. Art. 46.05(b) (Vernon 2007) (expressly providing that the trial court retains jurisdiction for purposes of resolving claims of competence to be executed).

250. Indeed it is somewhat ironic that the Conference of Chief Justices (CCJ), representing the Chief Judges from each state's highest court of review, is one of the entities driving the problem-solving court movement, which urges trial courts to rethink their roles and traditional case processing methods. *See, e.g.*, In Support of Problem-Solving Court Principles and Methods, CONFERENCE OF CHIEF JUSTICES Res. 22, 56th ann. Mtg., (Aug. 3, 2000) (outlining the findings and suggestions of a Chief Justices Task Force and encouraging perpetuation of the problem-solving court model).

251. *See* Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J. APP. PRAC. & PROCESS 141, 143 (2006) (discussing the extent and possibility of greater reliance on delegation of certain appellate court duties to court staff); *see also* Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. (forthcoming 2008) (manuscript at 10–11, on file with the Washington and Lee Law Review) (discussing the establishment of bankruptcy courts as "adjuncts" of the federal courts).

complication involved with remand only serve to muddy the waters where the interests at stake call out for contemporaneous consideration.[252]

Moreover, there may be real value in having appellate courts more closely involved rather than operating at arm's length from the litigation.[253] Historically, appellate courts have remanded cases to trial courts whenever there was a need for creating an additional record relating to an issue on appeal. Where the issue to be considered actually relates to the efficacy of the appeal, there would seem to be very little reason to involve the trial court. It has no interest in whether the appellate process is meaningful. Having the appellate court interact with the individual whose competence is in question not only works to familiarize the court with the extent of the defendant's condition as in trial courts, it is simply more respectful. Having appellate counsel handle such hearings, thereby requiring greater interaction with clients through in-person visits and otherwise, also advances the objectives of client-centered lawyering. This is a feature that is sorely missing from current appellate practice.[254]

3. Remedies

Finally, in redrafting the Standards, the ABA should outline a variety of remedial measures designed to meet the various contexts in which competence issues may arise.[255] Specific guidance in commentary would be useful for practitioners and courts considering the implications of the various avenues of relief. For instance, the ABA might suggest that counsel should request a stay during an appeal only where it seems most appropriate given the possible issues that might be raised in a given case, the length of the sentence involved, and other relevant non-confidential factors. For a client sentenced to death, holding off for one year or more would likely be seen as valuable to the defendant. But for a defendant who is serving a relatively short jail sentence that might expire before he regains competence, a stay might not advance his interests.[256]

---

252. *See* Primus, *supra* note 165, at 696 ("When a panel of appellate judges reads the trial court record in a case and addresses the legality of the defendant's conviction, it is more efficient for that panel to address and resolve all of the potential issues at the same time.").

253. *Cf.* People v. Stultz, 810 N.E.2d 883, 888 (N.Y. 2004) (observing that, in assessing ineffective assistance of appellate counsel claims, "[a]ppellate courts are uniquely suited to evaluate what is meaningful in their own area").

254. *See supra* Part IV.D (discussing the drastic reduction in client contact with courts and lawyers from the trial level to the appellate level).

255. *See* State v. Debra A.E., 523 N.W.2d 727, 734 (Wis. 1994) ("The method of evaluation will vary depending on the facts and on whether and where the defendant is incarcerated.").

256. *See id.* at 729 (recognizing the defendant's interest in expediting post-conviction relief

One important possible avenue of relief for incompetence on appeal has not been discussed in case law or otherwise. That is the possibility of civil commitment where it appears a defendant is not likely to regain competence. Borrowing a page from *Dusky* and its progeny, a stay for purposes of reestablishing defendant capacity may not be indefinite.[257] Rather, under *Jackson v. Indiana*, continuance of the proceedings, absent civil commitment proceedings, may extend only for some reasonable time period to ascertain whether the defendant "will attain . . . capacity in the foreseeable future."[258] If it appears the defendant likely will not become competent in any foreseeable period of time, the state must either initiate civil commitment proceedings or release the defendant and dismiss the charges.[259] The same, it would appear, should hold true for sentenced defendants pending appeal. Thus, the ABA's Criminal Justice Mental Health Standards could make a similar recommendation when dealing with appellants who fail to regain competence in a reasonable period of time. This could have a particularly significant impact in the death penalty arena. The criminal justice system gives lavish attention to competence of defendants facing death, but far less attention to the very same defendants while involved in direct appeals. The effects of new ABA recommendations would provide a more coherent framework for courts and attorneys dealing with seriously mentally ill defendants who have killed. The appropriate ultimate action to be taken in such matters if competence cannot be restored would be hospitalization.[260]

Again, in keeping with client-centered principles, whatever remedies defense counsel seek should be as consistent as possible with the role and

---

and reaching a final determination of the merits); *see also* United States v. Boigergrain, 155 F.3d 1181, 1184 (10th Cir. 1998) (explaining that six months passed from the time of Boigergrain's counsel's motion to determine Boigergrain's competency to the time when such determination was made). Similarly, the Standards should also address when the appointment of a second lawyer, next friend, or guardian might be appropriate post-judgment. However, given the concerns about abiding by the objectives and goals of a client, it seems likely that such relief seldom would be sufficient in and of itself.

257. *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972) (limiting the duration of continuances for the purpose of reestablishing competency); *see also* Jones v. United States, 463 U.S. 354, 368 (1983) (holding that a defendant found guilty of committing a criminal act, but "insane" at the time, could be hospitalized until he regained "sanity"—even if that meant a period of hospitalization longer than the maximum potential prison sentence the act carried).

258. *Jackson*, 406 U.S. at 738.

259. *Id.*; *see generally* Douglas Mossman, *Predicting Restorability of Incompetent Criminal Defendants*, 35 J. AM. ACAD. OF PSYCHIATRY & L. 34 (2007) (suggesting that defendants with histories of lengthy in-patient and irremediable cognitive disorders, like mental retardation, are not likely to ever attain competence).

260. *But see* Bonnie, *supra* note 8, at 1182 n.67 (suggesting a reduction in sentence to life imprisonment as the appropriate remedy—even on appeal).

discernable goals of the client, and should not work to disclose client confidences or defense strategy. It is also important that remedies not be used for punitive purposes and that reforms do not make a bad situation even worse for impaired defendants. Thus, prosecution requests for suspension of the proceedings for the appellant to regain competence—if even permitted on appeal—should be carefully scrutinized.[261] This is particularly true if such a stay would likely result in completion of sentence during this rehabilitative period prior to review of legal claims. There are other potential downsides, too, with these proposals.[262] However, these suggestions are intended as a starting point for a larger conversation about improving practices for impaired appellants on appeal and beyond.

V. Conclusion

The current conventional wisdom that stresses competence of defendants during trial but ignores the incompetence of defendants on direct appeal makes little sense. The assumptions underlying this approach are inconsistent with reality, the law, and ethical defense practices. This appeal is offered as a starting point for further, in-depth evaluation necessary to make a coherent competence framework a reality in criminal cases. True reform of the criminal justice system's approach to warehousing the mentally ill and providing appellate counsel with inadequate resources are problems that extend beyond merely rewriting the ABA's Criminal Justice Mental Health Standards. Although change will not happen overnight, with the above suggestions for rewriting the ABA's Standards we can begin to untangle the mess that has become the United States system of criminal mental health law and policy. While we wait for the day that the mentally ill in this country are not punished for their impairments, we can at least work to ensure that such defendants have their day in appellate court.

---

261. *See generally* Michael Perlin, *Representing Criminal Defendants in Incompetency and Insanity Cases: Some Therapeutic Jurisprudence Dilemmas* (NYLS Legal Studies Research Paper No. 07/08-30, Apr. 15 2008), *available at* http://ssrn.com/abstract=1120891 (considering the therapeutic jurisprudential implications of the question of trial competence being raised by the prosecutor or the judge, rather than by defendant or his lawyer). My thanks also to Bruce J. Winick for raising this important issue.

262. For instance, my colleague Maurice Stucke has appropriately noted that opening up this avenue of rights and remedies during the appellate process may result in a movement to restrict the right to direct appeal altogether.